

CASES DETERMINED
BY THE
SUPREME COURT
OF
THE STATE OF MISSOURI
AT THE
OCTOBER TERM, 1884.

(Continued from Volume 84.)

FITZGERALD V. BARKER, *Appellant*.

1. **Note, WHEN NEGOTIABLE : POSSESSION : HOLDER.** Notes made payable to the order of the payee, and indorsed by him, are negotiable, and one who brings suit upon them, having them in possession, is *prima facie* the holder and owner of them.
2. ——— : **INDORSEMENT.** Whenever a bill or note is payable to a certain person, or order, it is the same as if expressed to be payable to the order of that person, and is payable to whomsoever the payee named may, by indorsement, order it to be paid.
3. ——— : **POSSESSION : RIGHT OF ACTION.** A note payable to the order of a certain person, when indorsed by him, becomes at once negotiable, and passes from hand to hand, like notes made payable to bearer ; it is transferable by delivery, and possession proves property in it, and the right and capacity of the possessor to sue.
4. **Practice : ADMISSIONS : NON-SUIT.** Where the answer admits the deed under which defendant claims, which deed contains an assumption of the payment of certain notes in suit, this is sufficient to make out a *prima facie* case for plaintiff, and should prevent the latter's being forced to a non-suit.
5. ——— : **EVIDENCE : ADMISSION.** Where, in a suit upon notes, certain notes are offered in evidence without objection, this amounts to a tacit admission that they are the notes in suit.

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4. **Assumption of Debt by Recital in Deed : LIABILITY.** Where a purchaser accepts and holds under a conveyance containing a clause which recites that he has assumed and agrees to pay a note secured by a subsisting mortgage on the land, he thereby subjects himself to a liability which the holder of the note may enforce by a personal action. *Fitzgerald v. Barker*, 70 Mo. 685. And this assumption extends not only to the holder at the time of such assumption, but to any subsequent holder : it is as broad and unrestricted as the negotiability of the note agreed to be paid.
7. **Recital in Deed : ESTOPPEL.** Where the deed under which a defendant claims, contains recitals of the assumption of the payment of certain notes by him, he can no more deny such recitals than he can any other recital contained in the deed.
8. **Assumption of Another's Debt : ESTOPPEL.** Where one, for a valuable consideration, assumes the payment of certain notes, he will be estopped from denying their existence at the time he assumed their payment.
9. **Ordinary Course of Business : PRESUMPTION.** Where a deed of trust made to secure the payment of certain notes, was executed prior to the execution of a deed to defendant, in which is assumed the payment of the notes, it will be presumed that the ordinary course of business was pursued, and that the notes had been executed and delivered when defendant assumed their payment.
10. **Practice : DUTY OF JURY.** It is obligatory upon juries to find in favor of a party who is supported by a presumption of law, in the absence of opposing evidence.
11. **Executory Contract : PROMISE TO PAY NOTE WHEN EXECUTED.** If, upon a valuable consideration, a specific promise be made to pay certain notes whenever they shall be executed, the contract will be good as an executory agreement, and the valid promise will attach to the notes immediately upon their execution.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Taylor & Pollard for appellant.

(1) The non-suit was right, because the promise of Barker was not made for the benefit of Fitzgerald. He never had seen nor heard of these notes until long after Barker's deed had been delivered. Nothing was owned

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or held by Fitzgerald at the delivery of Barker's deed, to which the latter's promise could possibly attach in his favor. In cases like this the action accrues only to the person for whose benefit the promise was made. *Robbins v. Ayres*, 10 Mo. 538; *Rogers v. Gosnell*, 51 Mo. 466; *Hannegan v. Hutchinson*, 47 Mo. 237; *Fitzgerald v. Barker*, 4 Mo. App. 107; s. c. 70 Mo. 685; *Mansur v. Bartholow*, 8 Cent. L. J. 72. (2) To give a party who may derive a benefit from the performance of the promise an action, there must be first an intent by promisee to secure some benefit to said third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty. *Vrooman v. Turner*, 69 N. Y. 280. (3) The promise of defendant having been made for the benefit of Rubelmann, if anyone, the plaintiff cannot maintain an action upon such promise, without an assignment thereof to him. See cases cited under first point. (4) If the notes offered in evidence are the same as those mentioned in the deed to Barker, and Rubelmann, after the delivery of Barker's deed, endorsed and delivered the notes in question to plaintiff, that alone would not have transferred to him any right of action against Barker. Nothing but an assignment of this covenant to plaintiff would give him a right of action thereon. (5) If, as a fact, no notes had been issued, and the recitals that they had were false, then no person could reap the benefit of defendant's promise, because there was nothing to which it could attach. *Goodman v. Randall*, 44 Conn. 321; *King v. Whiley*, 10 Paige 416. (6) There was a material variance between the allegations of the petition, and the evidence offered by plaintiff to sustain his cause. The variance consisted in this: It is alleged that the notes were held and owned by plaintiff at the time Barker's deed was executed, and it is also alleged that the notes assumed by Barker were executed by John S. Thomas. The evidence is absolute that no such notes were owned by plaintiff at the time alleged. Moreover, the cove-

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nant of Barker was to assume and pay certain notes executed by John R. Thomas, not John S. Thomas.

Edward White for respondent.

(1) The circuit court was not warranted in assuming that plaintiff acquired the title to the notes after the execution of the deed from Thomas to Barker. This was a question of fact which should have been left to the jury, under proper instructions, if it was material. (2) But it was wholly immaterial whether plaintiff acquired the title before, or after the promise by Barker to pay the notes. The notes were negotiable, and Barker's obligation attached to them and passed with them to plaintiff, it being clear from the evidence that he received them before maturity. (3) No doctrine is now more firmly established than that, where a promise is made by one person to another, for a valuable consideration, to pay his debt to a third, such third person may sue on the promise in his own name. *Meyer v. Lowell*, 44 Mo. 328; *Flanagan v. Hutchison*, 47 Mo. 237; *Rogers v. Gosnell*, 51 Mo. 466; *Schuster v. K. C., St. J. & C. B. R. R.*, 60 Mo. 290; *Fitzgerald v. Barker*, 70 Mo. 685; *Lawrence v. Fox*, 20 N. Y. 268; *Campbell v. Smith*, 71 N. Y. 26; *Hand v. Kennedy et al.*, 83 N. Y. 149. (4) And where the promise is a general one to pay debts, the creditor may recover, even though, at the time the promise was made, the promisor was not aware of the existence of the debt, or was deceived with reference to it by the promisee, or did not know the name of the creditor. *Raum v. Kaltwasser*, 4 Mo. App. 573; *Cross v. Truesdale*, 28 Ind. 44; *Kingsbury v. Earle*, 27 Hun. 141. (5) In this case, the promise was not to pay any particular creditor named in the deed, but to pay certain negotiable notes, which were sufficiently described in the deed for identification. The promise was, therefore, clearly made for the benefit of the holder of the notes at their maturity. It must be presumed that such was the intent of both the promisor and the promisee.

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(6) Though, at the time a promise is made, no individual is either named or known as the beneficiary, yet, if the promise is to take effect in the future, and when the time of performance arrives, there is but one person who can fill the description of the person or class intended to be benefited, he must be taken to be the one originally intended. *Fitzgerald v. Barker*, 13 Mo. App. 192.

(7) The fact that the deed of trust, by which the notes in question were secured, recited that the notes were executed in satisfaction of an indebtedness due to one Rubelmann, is wholly immaterial. The promise was not to pay Rubelmann, nor to pay off the deed of trust, but to pay the notes. The notes were negotiable, and passed by delivery. They passed directly from Thomas, the maker, to the plaintiff, and were never in the possession of Rubelmann. The deed of trust was a mere incident, and was offered in evidence only to identify the notes. Plaintiff was not bound by its recitals.

(8) Barker's promise was not a promise to pay the debt of another, but a promise to pay his own debt for the land, and to do this by paying off the notes executed by Thomas. *Hand v. Kennedy et al.*, 83 N. Y. 154.

SHERWOOD, J.—This cause has been before us on a former occasion, 70 Mo. 685. It was then ruled, in affirmance of the judgment of the St. Louis court of appeals, that if a purchaser accepts and holds under a conveyance which contains a clause reciting that he has assumed and agrees to pay a note secured by a subsisting mortgage on the land, he thereby subjects himself to a liability which the holder of the note may enforce by a personal action. The cause came up here upon the sufficiency of the petition, which was adjudged sufficient. Since that time, the cause was heard in the circuit court, where, at the close of plaintiff's case, the court instructed the jury that the plaintiff could not recover, whereupon he took a non-suit, etc. The petition upon which the cause was tried is the same as was adjudged

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sufficient in this court, and is substantially as follows: That on the second day of November, 1872, John S. Thomas and wife, by their deed of that date, conveyed to John Barker certain real estate situated in the city of St. Louis; that, by said deed, Thomas covenanted to warrant and defend the title to said property against the claims of all persons, except against certain deed of trust notes on said property, to-wit: two notes of two thousand dollars each, payable two years after date; and eight interest notes for one hundred dollars each, payable respectively at six, twelve, eighteen and twenty-four months after date—all of said notes being made by said John S. Thomas, and payable to his own order, which notes said Barker assumed and agreed to pay, said assumption and agreement being duly incorporated in said deed from Thomas to Barker; that at the date of the said deed, the plaintiff was the holder and owner of one of the said two thousand dollar notes, and the four interest notes thereon, payable respectively in six, twelve, eighteen and twenty-four months; that defendant accepted said deed and entered into possession of said property, and thereby, and by reason of said assumption and agreement, became liable to pay the said several notes to plaintiff as the holder thereof; that the first of the said interest notes was duly paid by defendant to plaintiff, at its maturity, but that the remaining notes were never paid. The prayer of the petition was for judgment against the defendant for the amount of said principal note, two thousand dollars, and said three interest notes, one hundred dollars each, and interest thereon.

Defendant filed an amended answer, which admitted "that John S. Thomas, and wife, on the second day of November, 1872, conveyed to the defendant the property described in the petition, and that the said deed contained an assumption of two notes of two thousand dollars, executed by John R. Thomas, and eight interest

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notes of one hundred dollars each ; but denies each and every other allegation of the petition."

The plaintiff, to sustain the issues on his part, offered in evidence, without objection, the notes and deed of trust described in the petition, the deed from Thomas to Barker, containing the assumption of the notes, and then testified, in substance, that, in the fall or the winter of 1872, Thomas owed him a large sum of money ; that he was pressing for payment, and that Thomas assigned and delivered to him the notes in question as part payment of the debt ; that he did not get the notes and deed of trust from Rubelmann, did not know him in the transaction, that when the first interest note matured, the defendant, Barker, paid it, but that he failed to pay the other notes, and that they still remain unpaid. On cross-examination he stated that, while he could not fix the date when he received the notes from Thomas, it was some time in the fall or winter of 1872, and might have been after the deed of trust was recorded ; that he thought it was recorded when he got it, and that it had been in his possession ever since, except when he gave it to McClellan, the trustee, to advertise the sale.

The ruling made when this cause was here before, goes far towards being decisive of it as now presented. Here, the party suing being in possession of the notes, is *prima facie* the holder and owner of them, and the notes being made payable to the order of the payee, and by him indorsed, are negotiable notes, and "whenever a bill, or note, is payable to a certain person or order, it is the same as if expressed to be payable to the order of that person, payable to whomsoever the payee named, may, by indorsement, order it to be paid." Daniel Neg. Inst., sec. 99. The notes in question being made payable to the order of Thomas, as soon as he indorsed them in blank they became at once negotiable, and passed from hand to hand like notes payable to bearer ; they were transferable by delivery, and their possession by plaintiff proved his property in them, and his right and capacity

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to sue. 1 Dan. Neg. Inst., sec. 693, and cases cited; *Spears v. Bond*, 79 Mo. 467. The answer virtually admits the assumption of the payment of the notes in suit; at any rate, it admits that certain real estate was conveyed by Thomas and wife to defendant by deed dated November 2, 1872, and that deed, thus referred to, contains an assumption by the defendant of the payment of the notes in suit. This was sufficient to make out a *prima facie* case for plaintiff, and should have prevented his being forced to a non-suit. Besides, when the notes and deed of trust by Thomas and wife, to McClellan, and the deed by Thomas and wife to defendant, were offered and read in evidence, they were received without a word of objection, and this, of itself, was a tacit admission by the defendant that they were the notes in suit. If they were not, by timely objection, by pointing out any substantial difference between the notes sued on and those offered, he could very easily have prevented their introduction in evidence.

If, as has already been held in this case, the assumption of the payment of the notes by the defendants as contained in the deed of November 2, 1872, accepted by him from Thomas and wife, bound him to pay the holder of the notes, then, under the principle thus declared, that assumption will extend not only to the holder at the time the assumption was made, but to any subsequent holder. Granting such force as has been granted to the assumption by this court, it must be thus construed, or else it would be so restrictive in its operation as to curtail the negotiability of the notes promised to be paid. In short, the assumption of payment must be held as broad and unrestricted as the negotiability of the notes agreed to be paid. These remarks sufficiently dispose of the point that plaintiff cannot maintain an action on the notes without an assignment of them to him by Rubelmann; for the possession of them by plaintiff was certainly sufficient to raise a presumption

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of a proper transfer having been made to plaintiff, either by Rubelmann, or by some one else possessed of title to the notes. But, it is said, "if as a fact no notes had been issued, and the recital that they had was false, then no person could reap the benefit of defendant's promise, because there was nothing on which it could attach." It is not apparent how a party situated as is defendant, could deny the recitals in relation to the notes, any more than he can repudiate any other recital of the deed under which he claims. This view appears to be sustained by authority. "Thus, if one be bound in a bond, conditioned to perform the covenants in a certain indenture, or to pay the money mentioned in a certain recognizance, he shall not be permitted to say there was no such indenture or recognizance." 1 Greenl. on Evid., sec. 26. And it must be obvious that in order to a recovery in this action; in order to the enforcement of the personal liability created by the assumption contained in the deed, that deed must be offered in evidence along with and to identify the notes, and that it would be contrary to every principle of law and fairness to permit the defendant to defeat the plaintiff's action by denying that the notes sued on were in existence at the time he assumed their payment. That assumption as to every lawful transferer of the notes, concluded the defendant from asserting the contrary of what he had theretofore, for a valuable consideration, admitted.

But, waiving that point, it may be well maintained that the notes were in existence at the time their payment was assumed. The deed of trust which secured the notes in suit, was dated and acknowledged on the first day of November, 1872, and the deed of Thomas and wife on the second day of November, 1872. Now, according to the usual and ordinary course of business the notes were executed, and in the hands of the trustee, or Rubelmann, prior to the execution of the deed by Thomas and wife to the defendant. This affords ground

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for the presumption that the ordinary course of business was pursued in that instance. 1 Greenl. on Evid., secs. 38, 38a and 40, and 48; *Aull Sav. Bk. v. Aull's Adm'r*, 80 Mo. 199; and it is obligatory upon juries to find in favor of a party who is supported by a presumption of law, in the absence of opposing evidence. Best on Evid. (6 Eng. Ed.) sec. 304. Invoking this presumption in the case at bar, there being nothing to abate its probative force, it can very properly be concluded that the notes were in existence at the time their payment was assumed, and therefore, there was something *in esse* upon which defendant's promise could attach.

But I quite agree with the court of appeals that it is immaterial whether the notes were really in existence or not at the time their payment was assumed. The analogies of the law respecting a contract of sale, may here be successfully invoked in this instance. Thus, in order to a valid contract of sale, the thing sold must have an actual or potential existence, etc., but though this is not so, yet the contract may be good as a special or executory agreement (2 Kent's Com. 465), to be enforced, when the thing contracted for comes into being. Here, if the notes were not in existence at the time indicated, yet a sufficiently specific promise having been made, upon a valuable consideration, to pay them whenever they were executed, the valid promise would immediately attach to them upon their execution. Therefore, the judgment of the St. Louis court of appeals is affirmed. All concur.

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HARTZLER, Assignee, v. TOOTLE *et al.*, Appellants.

1. **Assignment for Benefit of Creditors:** STATEMENT OF PROPERTY: STATUTE. A deed of assignment under the statute for the benefit of creditors is not invalid because no statement of the property assigned as required by Revised Statutes, section 363, is filed at the same time with the deed.
2. **Deed of Assignment:** PARTNERSHIP PROPERTY. The deed of assignment in this case held not invalid for the alleged reason that partnership property was assigned for the benefit of all the creditors and not for the benefit of firm creditors.
3. ———: RESERVATION OF PROPERTY EXEMPT BY LAW. A deed of assignment is not void as a matter of law because it contains a general reservation in the assignor of the property exempt by law from seizure for his debts.

Appeal from Cass Circuit Court.—HON. N. M. GIVAN,
Judge.

AFFIRMED.

Comingo & Slover and Wooldridge & Daniel for appellants.

(1) The instruction given for plaintiff was wrong. *Tiemon v. Molliter*, 71 Mo. 513; *Phelps v. McNeeley*, 66 Mo. 554; *Tenney v. Johnson*, 43 N. H. 144; *Ferson v. Monroe*, 21 N. H. 462. (2) Plaintiff's instruction should have been refused and defendants' first one given. *Shackleford v. Clark*, 78 Mo. 492; *Hillaker v. Clark*, 65 Mo. 604; *Caldwell v. Scott*, 54 N. H. 418; *Weaver v. Weaver*, 46 Ib. 191; *Benson v. Ela*, 35 Ib. 420; *Menagh v. Whitwell*, 52 N. Y. 146; *Burtus v. Tisdall*, 4 Barb. 571; *Conroy v. Woods*, 13 Cal. 626; *Williams v. Gage*, 49 Miss. 777; *Linford v. Linford et al.*, 28 N. J. Law, 113. (3) By the provisions of the alleged assignment, Cummins reserves to himself an interest in the property

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he attempted to convey, which the law forbids. When he attempts to except from the assignment "such articles of property, and such real estate as are by law exempt from execution," he reserves, or attempts to reserve, to his own use, property which, in contemplation of law, he held in trust for the creditors of Cummins & Handley, among whom were the defendants. See authorities, *supra*; also *State ex rel. Billingsley v. Spencer et al.*, 64 Mo. 355, and citations. Defendants' other instructions, especially the second and fourth, should have been given. At the time of the levy of defendants' attachment, there had not been a valid assignment, nor one that could be thereafter perfected as against their rights acquired thereby. R. S. 1879, sec. 362, p. 55; *Juliand v. Rathbone*, 39 N. Y. 369.

W. J. Terrell and Railey & Burney for respondent.

(1) The court properly declared the law in the instruction given for plaintiff. (2) The reservation of property exempt from execution is not inconsistent with a deed of assignment for the benefit of creditors. Burrill on Assignments (3 Ed.) p. 263; *Garnor v. Frederick*, 18 Ind. 507. (3) The requirement of Revised Statutes, section 362, that the assignor make a statement in writing, verified by affidavit, at the time of the execution of the deed of assignment and file the same for record with the deed is not mandatory as regards time. *Deaver v. Savage*, 3 Mo. 139; *Duvall et al. v. Blair et al.*, 7 Mo. 449; *Hardcastle v. Fisher*, 24 Mo. 70; *Bates v. Ableman*, 13 Wis. 644; *Steinlin v. Halstead*, 52 Wis. 289; *Clark v. Mix*, 15 Conn. 177; *Turner v. Jaycock*, 40 N. Y. 470; *Woodward v. Marshall*, 22 Pick. 468 and 473; *Hollister v. Loud et al.*, 2 Mich. 310; *Coots v. Chamberlain*, 39 Mich. 565 and 568; *Stamp v. Case*, 41 Mich. 267; *Meeker & Perkins v. Sanders & Shaw*, 6 Ia. 60; *Juliand v. Rathbone*, 39 N. Y. 369, has been overruled and is not

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the law. *Juliand v. Rathbone*, 39 Barb. 97; *Van Vleet v. Slauson*, 45 Barb. 317; *Evans v. Chapin*, 20 How. Pr. 289; *Barbone v. Everson*, 16 Abb. Pr. 366; *Hardmann v. Bowen*, 39 N. Y. 196.

DEARMOND, C.—Jasper N. Cummins and Lewis B. Handley, composing the firm of Cummins & Handley, carried on business as merchants at Green City, in Cass county, for a number of years. The firm became largely indebted, among their creditors being Tootle, Hanna & Company, the defendants herein. Handley became the partner of Cummins in 1880, and sold out to him in November, 1881, between the first and the tenth days of the month, it seems, for about \$1,100, Cummins to take assets and assume liabilities. On November 21, Cummins and wife gave a deed of trust on a partnership lot on which a grain house was situate, and on another lot to secure the payment of about nine hundred and thirty-five dollars to Handley, the latter having taken certain notes belonging to the firm for the balance of what he was to get for his interest in the firm property. December 1, Cummins made an assignment to his son-in-law, Isaac H. Liston, for the benefit of his creditors. On December 3, Tootle, Hanna & Company, in a suit in the Cass circuit court against Cummins & Handley, attached the property assigned by Cummins to Liston. S. Z. Hartzler was appointed by the circuit court assignee of Cummins, Liston being unable to give a bond. Thereupon Hartzler qualified as such assignee, and interpleaded for the property assigned to Liston, and afterwards seized in attachment. The case made on the interplea was tried by the court without the intervention of a jury, and judgment given for the interpleader, to reverse which the attaching creditor appealed to this court.

Appellants argue that the pretended sale of Handley to Cummins was fraudulent, and the deed of trust from Cummins a part of the same intentional fraud. The

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firm, it seems, enlarged the field of their operations, built a grain house and embarked in the grain trade. And although at the wind-up the assets were found to be considerably less than the liabilities, yet the assumption is allowable on the whole record that neither knew much about the firm affairs, and hence that there was not honesty and good faith in these transactions is not an inevitable conclusion. There is nothing in the record establishing the existence of the fraud in fact attributed to Cummins and Handley. This is not the first instance of country store-keepers, expanded into grain dealers, finding great expectations ruinously discounted.

The decision of the case must hinge upon the one declaration given for the interpleader, upon which a number of questions arise. If it was not error to give this declaration it was not error to refuse those asked by defendants. It is this :

"If the court, sitting as a jury, believes from the evidence that Jasper N. Cummins was, on and prior to the first day of December, 1881, indebted to the various parties described in evidence, and insolvent ; that in good faith, for the sole purpose of paying off his debts and liabilities, he made a general assignment of all his goods, chattels, property and effects, subject by law to the payment of his debts, to Isaac M. Liston, assignee, for the use and benefit of all his creditors aforesaid ; that said Liston, in good faith, for the sole purpose of carrying into execution the duties and trust devolving upon him by virtue of said assignment, did enter into possession of said assigned property, as assignee aforesaid, prior to the levy of the attachment herein, and was proceeding in good faith, under said assignment, to take an inventory of the goods, chattels, property and effects of said Cummins, and was in the actual possession thereof, as such assignee, proceeding to execute the trust aforesaid, before and at the time of the levy of the writ of attachment

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in this cause, upon the property aforesaid, then the court should find for the interpleader, S. Z. Hartzler."

Under this declaration, the only one given, the finding of the court disposes of all issues of fact and all arguments upon the tendency and weight of the evidence, etc., leaving for consideration here certain questions of law only. The deed of assignment to Liston, after reciting that Cummins was unable to pay his debts in full, and desired to make a fair and equitable distribution of all his property among his creditors, conveys, etc., to Liston and his assigns forever "all and singular the lands, tenements and hereditaments * * * where-soever the same may be situated, and which lands are intended to be described in schedule 'A' hereto annexed, and to pass to said assignee under this assignment, whether correctly described or not, except homestead of said party of the first part, and also all goods, chattels, rights and credits, judgments, bonds, choses in action, evidences of debt, and property of every name and nature whatsoever of the said party of the first part, and the books, vouchers and securities relating to the same and which are intended to be described and enumerated in a schedule of same hereto annexed as exhibit 'B,' and all to pass to the said assignee, whether described or not, except such articles of property and such real estate as are by law exempt from execution. To have * * * in trust for the use and benefit of all the creditors of the said party of the first part, and to be held and cared for, controlled and disposed of according to the statutes of Missouri concerning assignments for the benefit of creditors. And it is further specified that if said schedule 'B' is not filed with or annexed to this deed of assignment, then the inventory filed with the circuit court of said county shall describe and specify said personal property * * *."

This deed was executed and acknowledged December 1, and filed for record December 5. No schedules were attached to it till December 8, when Cummins made one

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under oath and in it described and valued the real and personal property "as assigned." This schedule contained over five hundred dollars' worth of property, in addition to that formerly belonging to the partnership, and exclusive of a homestead valued at six hundred dollars, put into the schedule and claimed as exempt. Prefixed to the schedule is the following: "This statement not verified or completed until December 8, 1881, because of sickness and being unable to ascertain at time of execution of deed of assignment, so as to make a careful estimate of value of said goods and chattels." The verification is "* * * that the above and foregoing is a correct and full statement of all my property and effects, including all personal property, whether exempt from execution or not, turned over and assigned for the benefit of my creditors on the day first aforesaid * * *." This schedule was filed for record the day it was made. The evidence showed that Liston took possession of the property on December 1, immediately after the assignment, and, with the aid of three or four helpers whom he employed, at once began making an inventory of the goods in the store, and continued inventorying till the goods were attached the evening of December 3. On December 8, Liston verified by the proper oath his inventory of the property assigned to him, and on the thirteenth of the same month filed his inventory in the circuit clerk's office. He never gave any bond, and was removed by the circuit court December 16, and interpleader appointed in his place, as has been stated. Cummins was sick abed when he made the deed of assignment and did not get out till December 8, when he made and swore to the schedule. Part of the real estate assigned by him, valued at two hundred dollars, was said in the schedule to be subject to the Handley deed of trust. Handley obtained an allowance of his claim by Hartzler, assignee.

It is urged that the deed of assignment was inopera-

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tive because not accompanied by the verified statement required by section 362, Revised Statutes, and *Juliand v. Rathbone*, 39 N. Y. 369, is cited to support this position. I do not think the validity of the deed is wholly dependent upon the presence of this statement. The statement is not a part of the deed, for the deed must be "proved or acknowledged," etc., as other deeds. Sec. 354, R. S.; *Eppright v. Nickerson*, 78 Mo. 482. The "agent or attorney" could not thus execute the deed. The requisites of the deed are indicated in section 354, and there is no provision that to the deed, otherwise sufficient, the statement must be attached to give the deed validity. The requirement of section 362 is not accompanied by any condition rendering the deed void for non-compliance. I agree with counsel for respondent, that the chief office of the "statement" is to guide the court, judge or clerk in determining the penalty of the bond to be given by the assignee, and to aid the latter in getting into his hands all the assigned property. The authority of *Juliand v. Rathbone* is destroyed by later decisions of the same court. *Brennan v. Willson*, 71 N. Y. 502; *Hatcher v. Winter*, 71 Mo. 30, is a case where the assignees had not given bond, or appointed a time for the proving up of demands, but had taken charge of a large estate, and seemed to be managing things without regard to the statute or respect for the court. Of these assignees the court says: "If the trustees failed to discharge their duties under the deed, by a proceeding in the circuit court they could have been removed and others appointed in their stead." True, the statute has been amended, and the case just cited arose under the old law. But the principle is the same. Again, by section 355, the inventory should be filed, ordinarily, within fifteen days after the *execution* of the deed. By section 362, bond should be given within three days after the filing of the deed and statement for *record*; but no time is specified within which the filing *shall* take place. The assignee acquires

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the thing assigned by the deed. He does not acquire on condition that he give bond, make inventories, or do other things enjoined by the statutes. His trusteeship under the deed arises before any of these things can be done. For a neglect or failure to do his duty, he may be *displaced* and his trusteeship terminated. *Hardcastle v. Fisher*, 24 Mo. 70; secs. 366, 367, 381, 382, R. S.

As Cummins and Handley, as a firm, were largely indebted, it is said that the assignment cannot stand because the partnership property is assigned for the benefit of all the creditors of Cummins, and not for the benefit of the creditors of the firm. Handley having sold out to Cummins and retired from the firm, and Cummins having assumed the payment of all the debts of the firm, this transaction between Cummins and Handley cannot be investigated from anything supplied by the record. It is easy to understand how Cummins would follow the statute, section 354, by assigning for the benefit of all his creditors. In this is nothing to impeach the good faith of anybody, and, since the court has complete control over the allowance of demands against the assigned estate, and will act at the proper suggestion of anyone interested, I do not think the assignment can be held void, as a conclusion of law. If Handley had sold his interest in the partnership property, he was not a proper party to a deed of assignment meant to convey and transfer that which Cummins alone owned. The law says the assignment by the debtor shall be for the benefit of all his creditors. Cummins, then, made an assignment of his property, consisting, in part, of effects formerly owned by the firm, and partly of property in which the firm never had any interest. Cummins sustained the relation of a surviving partner, as to the disposition of the property derived from the firm, and as to the creditors of the firm, but no further. He was under no legal obligation to make the assignment as the sole representative of the dissolved partnership, nor could he, since he was

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the sole owner of the partnership effects, exclude his individual creditors from the assigned estate, though, as against the property derived from the partnership, their demands would be subordinated to those of the partnership creditors. In this case, there is no apparent confusion of the property from the partnership with the other property. The rights of creditors could easily be protected and enforced by the court in the settlement of the assigned estate. *Tiemann v. Molliter*, 71 Mo. 512, is not in conflict with this view.

A final objection to the deed is, that in it Cummins excepted generally "homestead" and such property as was exempt from execution. That his creditors could not subject to the payment of their demands anything which Cummins had a right to hold exempt from execution, is not the less true because in his deed he insists on his right to the exemptions provided by law. It appears, in fact, by reference to the schedule, and according to my understanding of the whole record, that Cummins claims as exempt his homestead, which, in his schedule, he locates and designates, and that alone. This homestead never belonged to the partnership, and so *Billingsley v. Spencer*, 64 Mo. 355, is not in point. Besides, I do not understand that a deed of assignment is void, as a matter of law, merely because it contains a general reservation of the property exempt by law. Whether or not any particular estate or article passes by the deed, or is exempt, or is liable to be seized in attachment or on execution, can always be ascertained in the proper way. Assuming that the trial court reached a correct conclusion concerning the facts of the case, the assignment stands as honest in point of fact, made as the interpleader's declaration puts it, "in good faith for the sole purpose of paying off his (Cummins') debts," I find no reason to disturb the judgment, which should be affirmed. All concur.

The North St. Louis Gymnastic Society v. Hudson.

THE NORTH ST. LOUIS GYMNASTIC SOCIETY V. HUDSON,
Collector, Appellant.

1. **Injunction: ILLEGAL TAXES: CLOUD UPON TITLE.** Injunction is the proper remedy to prevent the sale of real estate for illegal taxes, whereby a cloud would be cast upon the title.
2. **School Building, Exemption from Taxation.** A school building exempted from taxation "so long as it is used only for the purposes of education" is not made taxable by the renting of a room therein for other purposes, where the proceeds thereof are used exclusively for the benefit of the school. *

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AFFIRMED.

Leverett Bell for appellant.

Plaintiff's charter exempts its property to the extent of \$50,000 from taxation, "as long as said property is used only for purposes of education." The fact that plaintiff leases one room in the building for a saloon and another for a store, destroys the claim to exemption, and the result is not changed by the further fact that the rents are applied to the support of the institution.

Wyman v. St. Louis, 17 Mo. 335; *College v. State*, 19 Ohio 110; *Chapel v. Boston*, 120 Mass. 212. The case presented is not within the doctrine of *State ex rel. Alexian Brothers v. Powers*, 74 Mo. 476. The rule is that exemptions from taxation are to be construed strictly. The court below proceeded in a contrary direction. *Cleveland Library v. Pelton*, 36 Ohio St. 253: 1 *Desty on Taxation*, 119; *Christian Association v. Donohugh*, 13 Phila. 12.

*These syllabi are taken from 12 Mo. App. 349.

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Hugo Muench for respondent.

(1) This court should not deviate from its former decisions as to what constitutes a binding contract between state and corporation, and which so firmly established the doctrine in this state, subsequent to the *Dartmouth College* case, as well as *Washington University v. Rowse*, 8 Wall. 440. See *Mechanics' Bank v. Kansas City*, 73 Mo. 558; *State ex rel. v. Powers*, 74 Mo. 476; s. c. 10 Mo. App. 263. There is an effort to distinguish this case from that of *State ex rel. v. Powers*, 10 Mo. App. 264; s. c. 74 Mo. 476; by the assertion that in the latter case, "the tax exemption was sustained on the ground that the business of conducting the hospital was a *charity*, notwithstanding payment was received from some of the inmates thereof," and then intimating that the objects of our institution are not charitable. That this argument rests in fallacy is shown by Adam's Equity, 172; *Am. Academy v. Howard*, 12 Gray 582, 594; *State v. Academy of Science*, 13 Mo. App. 216. (2) It is undisputed that the personalty taxed in this bill is used by no one except the society, and it is difficult to tell upon what theory it could have been properly assessed.

EWING, C.—This was a proceeding to enjoin the collection of taxes for 1881, levied on the real estate described in the petition. The circuit court made a decree in accordance with the prayer of the petition. The defendant appealed to the St. Louis court of appeals where the judgment of the circuit court was affirmed. The defendant then appealed to this court.

The plaintiff was incorporated by an act of the legislature of the twelfth of February, 1864, "for the purpose of educating children in gymnastics and the elementary

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branches of education," and provides for holding property, personal and real, which shall be exempt from taxation "as long as said property is used only for the purposes of education, provided, the value thereof does not exceed fifty thousand dollars," and "said stock not to pay interest or dividends." The tax bill was for state, city, and school taxes for 1881, and the bill was levied upon the real and personal property of the plaintiff, worth less than \$50,000, in St. Louis, where plaintiff carries on a school according to its charter. The personal property owned by plaintiff is devoted wholly to the conduct and purposes of said school. Upon the real estate, plaintiff has erected a two story brick building, paying for about one-half thereof, out of money arising from subscriptions issued pursuant to the charter, as also some other means; and the other half remaining a debt of the society. The entire second floor and a large portion of the first floor of the building, are used and occupied in the conduct of the school, and the two corner rooms on the first floor are let by plaintiffs at a monthly rental paid to it. This monthly rental is used by plaintiff in defraying the legitimate expenses of conducting the school, paying salaries of teachers, so far as this expense is not met by the voluntary contributions of the members, keeping building in repair and in paying debts of the association incurred in the building, of which last, to-wit: building debt, there remains unpaid \$6,000, which is a lien on the building.

These are the facts. We are of opinion that the court of appeals (12 Mo. App. 342), covered the whole controversy and decided correctly, and we adopt their opinion, and affirm their judgment. Martin, C., concurs; DeArmond, C., dissents.

Skyles v. Bollman.

SKYLES, *Assignee*, v. BOLLMAN *et al.*, *Appellants*.

Instructions: REVERSAL. The judgment of the St. Louis court of appeals reversing that of the circuit court affirmed, because of the action of the latter court in giving an instruction not authorized by the evidence.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Noble & Orrick for appellants.

(1) The bill of lading was not delivered to the bank by the *distilling company*, or anyone authorized by it to deliver the same as security for the payment of the drafts, or otherwise; and hence the bank got no title for any purpose as against Bollman & O'Hara. If Blumb had no authority to *endorse* the bill of lading, surely he had none to deliver without endorsement. (2) The instruction given for appellants was proper which told the jury that if "they believed from the evidence that the drafts drawn by the distilling company on Gregory & Stagg were delivered to Skilling, Carter & Ahrenz, by the distilling company, for *collection only*, and not as collateral to secure a prior indebtedness of the distilling company to Skilling & Company, they should find for defendants." The evidence of Mr. Blumb shows that the drafts were for *collection only*, and, furthermore, it is apparent the bank did not rely upon the bills of lading as collateral, because it first had notes of Sheber, and others, then a mortgage on the distillery, then, in February, 1876, a deed to the property, for security. The distilling company drew checks on the bank without reference to the state of the account, because the bank had the deed.

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Finkelnburg & Rassieur and Garland Pollard for respondent.

The delivery to the bank of the bill of lading, with the drafts drawn against the proceeds of the shipment attached, as security for the payment of the drafts, transferred the title to the highwines to the bank as completely and effectually as though there had been an actual delivery of the highwines themselves, subject to the acceptance of the drafts by Gregory & Stagg. *Mich. Cent. R. R. v. Phillips*, 60 Ill. 190; *West. U. R. R. v. Wagner*, 65 Ill. 197; *Broadwell v. Howard*, 77 Ill. 305; *Peters v. Elliot*, 78 Ill. 321; *O. & M. Ry. Co. v. Kerr*, 49 Ill. 458; *Bank of Davenport v. Homeyer*, 45 Mo. 145; *National Bank Green Bay v. Dearborn*, 115 Mass. 219; *National Bank Chicago v. Bailey*, 115 Mass. 228; *Newcomb v. B. & P. R. R. Co.*, 115 Mass. 230; *First National Bank v. Crocker*, 111 Mass. 163; 3 Parsons on Contracts, 487. It is not necessary that the bill of lading be indorsed on delivery, or that the name of the transferee in any manner appear upon it; a simple, manual delivery of the bill, unindorsed, with the intention of thereby transferring the property therein mentioned, either absolutely or as a pledge to secure a draft, passes the title to the property to the transferee of the bill. *Bank of Davenport v. Homeyer*, 45 Mo. 145; *Peters v. Elliott*, 78 Ill. 321. An antecedent debt is a sufficient consideration for the delivery of a draft and bill of lading to secure the same. *Peters v. Elliott*, 78 Ill. 321. The person who first gets the bill of lading (though only one of a set of three) gets the property which it represents; he need not do any act to assert his title which the transfer of the bill of lading itself renders complete, and any subsequent dealings with the others of the set are subordinate to the rights passed by that one. *Barber v. Meyerstein*, Law Reports, vol. 4, House of Lords Cases, p. 317; *Caldwell v. Ball*, 1

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Durnford & East, p. 205; *Valle v. Cerre*, 36 Mo. 587; 3 Kent's Com. (12 Ed.), p. 208. Instruction number two, given for defendants, was well calculated to mislead the jury. The uncontradicted evidence in the record shows that the bank was to apply the proceeds of these highwines to the payment of their claim against the distilling company, and it made no sort of difference whether the bank took the drafts in payment, and gave the distilling company credit at the time; or, whether they were to collect them and then give credit for the proceeds on their claim; in either case it held the bill of lading as security, and had the right to hold the highwines as against any subsequent purchaser from the distilling company.

BLACK, J.—This cause was here before, and is reported in 73 Mo. 665. The cause was again tried in the circuit court in conformity with the principles of law announced on the former hearing. There was a second verdict for the defendants, from which plaintiffs appealed to the court of appeals, where the judgment was reversed, and the defendants bring the cause here by appeal. The main facts in the case are substantially the same as when the cause was here before, and they need not be again stated. It is now conceded that one hundred of the one hundred and fifty barrels of the highwines were sold to the defendants, by Sherber, on the morning of the 26th of February, 1876, before the bill of lading was delivered to the bankers, Skilling, Carter & Ahrenz. The latter received the bill of lading from Blumb long before defendants purchased the remaining fifty barrels, so that this is really the only amount now in controversy.

The additional question, not before determined, grows out of an instruction given on the second trial, at the instance of the defendants. It is as follows: "If the jury believe from the evidence that the two drafts, each for \$7,000, drawn by the distilling company on

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Gregory & Stagg, were delivered to Skilling, Carter & Ahrenz by the distilling company for collection only, for account of distilling company, and not as collateral to secure a prior indebtedness of the distilling company to Skilling, Carter & Ahrenz, they will find for the defendants."

This instruction, we think, must be understood to assert the proposition that if the bank received the drafts solely for the purpose of collecting them, and without any right to apply the proceeds to the account of the distilling company, then the plaintiff could not recover. It, therefore, becomes essential to determine whether there was any evidence in the cause to justify the giving of this instruction. While it is true the evidence shows that the distilling company made a mortgage to the bankers to secure a debt of some \$12,000, and subsequently, on the first of February, 1876, made an absolute deed to them of the distillery property, for the consideration of \$18,000, still it shows beyond all dispute that they continued to make large advances to the distilling company from the date of the agreement, in 1874, to the date of these drafts. At this time the company was indebted to the bankers in about \$18,000; of this, \$12,000 had been advanced on the twenty-third of February, 1876, to enable the company to buy revenue stamps to be used in removing these two hundred barrels of highwines, of which shipment the bankers had been notified, and without this advance the highwines could not have been moved. The whole course of business between the bankers and the distilling company was that the former made advances, took the drafts of the latter, collected them and applied the proceeds in liquidation of the account. The books of the bankers were offered in evidence, and it is thought they make evidence in support of the theory hypothesized in the instruction. They show that the amount of these drafts, \$14,000, was applied to the credit of the distilling company on the 26th of February, 1876, the day they were delivered to

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the bank, and the overdraft was thereby reduced to about \$4,000. These drafts were by the bankers transmitted to their correspondents in St. Louis and charged to them, but when they were returned protested, appropriate counter entries were made in the accounts with the correspondent.

If anything was charged by way of discount, it makes against the theory of the plaintiff. If a charge was made for collection it is of but little moment, for that is but an every day occurrence, even when advances are made on such drafts. It ought not to be forgotten that these drafts were payable to the order of the bankers. These books are, by agreement, presented here on this hearing, and among other things it is claimed they bear evidence of erasures. The books are of a system frequently found used by bankers who conduct a limited business. Some of the figures found in the column which represents the daily balance of the overdrafts, do show some evidence of having been altered, but those which show the daily debits and credits and from which the former are mathematical deductions, bear no such evidence, so far as we can see. The following testimony appears in the record: "I will ask you, Mr. Blumb, what understanding, if any, the Beardstown Distilling Company had with Skilling, Carter & Ahrenz, with reference to the disposition of drafts drawn by the company against shipments. I see on the 25th of February, for instance, as on the 16th of July, you say you drew drafts on Bollman & O'Hara for some three thousand and odd dollars; how did you happen to draw that draft, what was done, and why did you draw it?" A. "We sold them fifty barrels of wine." Q. "Who did you sell it to?" A. "J. A. Marks & Son; but it was shipped to Bollman & O'Hara; it was so ordered." Q. "Well, who negotiated that sale?" A. "Well, it was done by letter and telegram to the company." Q. "With whom at Beardstown was the negotiation made, the distilling company, or Skilling, Carter & Ahrenz?"

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A. "The distilling company." Q. "When you sold it you got the bill of lading?" A. "Yes, sir." Q. "To whom was that whiskey consigned?" A. "Bollman & O'Hara." Q. "You got the bill of lading, then what did you do?" A. "I went to the bank and made a draft for the amount and placed it in the hands of the clerk." Q. "Your draft in their favor?" A. "Yes, sir." Q. "For what purpose did you put the bill of lading in the hands of Skilling, Carter & Ahrenz?" A. "For collection." Q. "As soon as the draft was paid you would get credit for the whiskey?" A. "Yes, sir." Q. "And if the drafts were not paid would you get credit?" A. "No, sir, we would not; and if we had credit they would be certain to charge it back to us." Q. "Now, in these transactions, these drafts drawn on Gregory & Stagg were the same things, were they not?" A. "Yes, sir." Q. "Well, they were not paid?" A. "The last ones were not, it seems." Q. "Have you any credit for the amount?" A. "I don't know about that; I don't think we have. I don't see their books." Q. "Were they left with them in the same manner as the Bollman & O'Hara drafts?" A. "There was no other arrangement made; it was done as theretofore."

The deposition of this witness was read by the plaintiffs. He was also examined at length by both sides. We have examined his entire testimony, and made this copious extract because the instruction seems to stand on this testimony alone. Beyond doubt, the bankers did receive the drafts for collection, in a measure, and had a right to charge them back, if not paid, but it does not follow that they had no other interest in them than mere collecting agents. As we view this evidence, it does not show or tend to show, that these bankers took the drafts for the sole purpose of collecting them and paying the proceeds to the distilling company, without regard to the overdraft or state of the account of the distilling company. Such a conclusion is at war with the general

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purport of the testimony of this witness, as we understand it from this record. It follows that the judgment of the court of appeals must be affirmed, and it is so ordered. The other judges concur.

THE STATE *ex rel.* PRAIRIE TOWNSHIP V. WALKER,
State Auditor.

1. **Township Railroad Aid Act: CONSTITUTION.** The fifth section of the act of 1868, to facilitate the construction of railroads (Laws 1868, p. 93), being unconstitutional and void (*Webb v. Lafayette County*, 67 Mo. 353), could furnish no valid authority to a township which had subscribed to a railroad to retain the taxes collected from such railroad, and they were properly paid into the state treasury, and, being so paid, the general assembly could not refund them to the township.
2. **Constitution: STATUTE.** The act of the general assembly of March 19, 1881 (Laws of 1881, p. 189), providing for the refunding of said taxes to the townships by the state, *held*, unconstitutional.

Mandamus.

WRIT DENIED.

E. J. Smith for relator.

(1) The state auditor should be compelled to draw his warrant as asked by relator. Laws of 1868, p. 92; Laws of 1881, pp. 189, 190. (2) The people of the county, relying on the validity of the fifth section of the act of 1868, were induced to make the subscriptions to the railroads, and to assume a liability which is held to be binding on them, by a court of competent jurisdiction, so that as they must pay the debt, it is not for the state, which held out this inducement to them, to withdraw

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this consideration and to leave them to suffer without its benefits. (3) The act of 1881 was passed since the decision in *Webb v. Lafayette County*, and is a legislative expression that this money should be paid; it is an appropriation to pay it and there is no constitutional provision forbidding it.

Smith & Krauthoff for respondent.

(1) Section one of the act of March 23, 1868, was a "legislative abortion," and so far as it authorized a township to become a stockholder in, or to loan its credit to, a railroad, it was violative of section fourteen, article xi, of the constitution of 1865. *State v. Brassfield*, 67 Mo. 331; *Webb v. Lafayette County*, 67 Mo. 353; *State v. Satterfield*, 54 Mo. 392; *Hayes v. Dowis*, 75 Mo. 250. (2) Said act is also in conflict with section 13 of article xi, of the constitution of 1865. Section 5 of said act is clearly violative of the constitution of 1865, for the reasons set forth in the opinion in *Webb v. Lafayette Co.*, 67 Mo. 353. (3) Said fifth section was also a continuing act of appropriation, by the terms of which the amount of taxes collected from the portions of railroad property referred to were appropriated annually to such townships as may have subscribed to the capital stock of the company owning the same. For this last reason, it was repealed by the constitution of 1875. Const., art. 4, sec. 3; art. 10, sec. 19; *State ex rel., etc., v. Holladay*, 64 Mo. 526; *State ex rel. v. Holladay*, 66 Mo. 385. (4) The act of 1881 is void, and hence relator's claim cannot be upheld. (5) Nor can it be said that the townships who have subscribed to the capital stock of a railroad company, have a vested right to receive all the state taxes collected on the property of said company, under the provisions of the fifth section of the act of 1868, for the obvious reason that against the state, no township or other subdivision can have vested right in or to any portion of the property or revenue of the state. *Conner v. Bent*, 1 Mo. 235;

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State v. St. Louis Co. Ct., 34 Mo. 545-67; *St. Louis v. Shields*, 52 Mo. 351; *State v. Holladay*, 70 Mo. 137; *School Districts v. Weber*, 75 Mo. 558. (6) The plaintiffs had no right to these taxes except such as was given to them by the legislature, and this right was subject to be diminished, changed, modified, and even destroyed at the pleasure of the state. *Richland Co. v. Lawrence Co.*, 12 Ill. 1-8; *School Trustees v. Tatman*, 13 Ill. 30; *Police Jury v. Shreveport*, 5 La. Ann. 661; *Youngs v. Hall*, 9 Nev. 212; Cooley Const. Lim. 238, and note 3. (7) There is no provision of the constitution or principle of common right that in any wise abridges this power. 1 Dill. on Mun. Corp. (3 Ed.) secs. 61, 52, and note 1 to sec. 57, and note 1 to sec. 56, p. 78; *State v. R. R. Co.*, 3 How. 550; *East Hartford v. Bridge Co.*, 10 How. 534; *Darlington v. New York*, 31 N. Y. 164, 187, *et seq.*; *Payne v. Treadwell*, 16 Cal. 221-233, *et seq.*; *San Francisco v. Canavan*, 42 Cal. 541-557; *Lucas v. Commissioners*, 44 Ind. 524; *Amite City v. Clemens*, 24 La. Ann. 27. (8) The fifth section of said act of 1868 is not in any wise in the nature of a contract, under which vested rights could accrue. (9) While the relator's claim must fail because of the expiration of the appropriation contained in the act of March 19, 1881 (Const., art. 10, sec. 19; 64 Mo. 526; 66 Mo. 385), and because there is now no existing appropriation out of which the demand set out in the petition (Const., art. 4, sec. 43; art. 10, sec. 19), the court is respectfully asked to determine the question of the validity of the fifth section of the act of March 23, 1868, when first enacted, and if valid then, the effect of the constitution of 1875, upon its existence. The question is one of vast public interest, and an authoritative determination of it is earnestly desired by the interested townships and the revenue officers of the state, and of the various counties affected by it. Large sums of state revenue are being withheld until this court shall settle the controversy by a decision of the question. *Dunklin County v. District Court, etc.*, 23 Mo. 449-454.

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RAY, J.—The object of this proceeding is to compel, by mandamus, the state auditor to draw his warrant on the state treasurer for the amount of certain taxes, collected from a railroad company, on its property in the township to whose use this proceeding is instituted, and to the capital stock of which company such township is alleged to have made subscriptions, and to have issued bonds in payment thereof. The acts of March 23, 1868, (acts of 1868, pp. 92, 93), and of March 19, 1881 (acts of 1881, pp. 189, 190), are relied upon by the relators as authorizing such demand. The demurrer of the respondent puts in issue the validity of these acts under the constitutions of 1865 and 1875. The various provisions with which said acts are alleged to conflict, will be indicated in the progress of this opinion.

It may be conceded that if the acts of March 23, 1868, and March 19, 1881, are constitutional and valid enactments, then, upon a proper and sufficient showing, as indicated in the act of 1881, it was the plain duty of the auditor to comply with the demand made upon him, and his refusal to do so would authorize the award of the writ called for. But if said acts are not valid and constitutional enactments, then it was equally his plain duty to refuse, as he did. Under repeated decisions of this court, the question of the constitutionality of the act of 1868 has been settled, and is no longer an open question with this court. *Webb v. Lafayette Co.*, 67 Mo. 353; *State ex rel. Woodson v. Brassfield*, 67 Mo. 331; *Hays v. Dowis*, 75 Mo. 250. In the case of *The State ex rel. Stamper v. Holladay*, 72 Mo. 499, and *The State ex rel. Wilson v. Rainey*, 74 Mo. 229, the former rulings of this court are in no proper sense departed from, but expressly recognized and approved. The correctness of the reasoning in the case of *Webb v. Lafayette County*, *supra*, is so accurate and comprehensive, and so logical and conclusive, that any effort to add to or improve the same is wholly useless, if not out of place.

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For the reasons there stated we may confidently rely on the correctness of the rulings in that case and those that follow, and concur therein, and we need not at length here reiterate or re-state them. The fact that in suits, at the instance of bondholders, against said township, a different ruling has been made, and said act of 1868 held valid and constitutional in another tribunal, having jurisdiction and competent authority to pass upon the question, is no reason why, in a proceeding in this court, like the present, we should now depart from our former rulings heretofore made, or grant the relief here prayed for. The fact, also, that the people of Prairie township, Bates county, may have been induced, as alleged, by the seeming authority of the act of 1868, to make said subscription and enter into said contract, while it may be the occasion of much regret and hardship, still, if unconstitutional, as repeatedly held, it furnished no constitutional authority for enforcing its otherwise unauthorized provisions, or for the subsequent act of 1881, which is equally invalid as that of 1868, and for the same reasons, and, also, for like reasons under sections 45, 46, and 47, of the fourth article of the constitution of 1875.

In the case of *Webb v. Lafayette County, supra*, the court held that the act of 1868 was unconstitutional and void, because it permits a subscription to be made by a township to the stock of a railroad company, if two-thirds of the qualified voters who vote on the question, at an election, are in favor of it, when the constitution of 1865 required the assent of two-thirds of all the qualified voters to authorize a municipal subscription. It also held the act to be unconstitutional because section five of the act devotes all the state and county taxes, to be collected within any township from any railroad company to which the township has subscribed, to the *reimbursement* of the township for its subscription, and after it is fully reimbursed, then to the *school fund* of the township. This, it was held, is *indirectly* mak-

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ing the *state* extend its *aid* to railroads, in violation of section 13, article 11, of the constitution of 1865; and is likewise making the county extend its aid to railroads, without the assent of two-thirds of the qualified voters of the whole county, in violation of section 14, article 11. If that be so, it must follow that the act of 1881, which undertook to provide for the *reimbursement* to certain townships in certain counties of the state of Missouri out of the state revenue, for moneys heretofore paid into the state treasury, claimed to belong to said townships, and, also, to appropriate out of any money in the state treasury, not otherwise appropriated, the sum of two thousand dollars, for the purpose of carrying out the provisions of said act, was, also, necessarily unconstitutional and void, for the like reasons stated in *Webb v. Lafayette County*, *supra*, and, also, by reason of sections 45, 46, and 47, of the constitution of 1875.

The relator's claim must fail, unless the validity of the act of 1881 can be upheld. This act, as we have seen, is clearly void for the reasons already stated, and it is also objectionable for other reasons. The fifth section of the act of 1868 furnished no valid authority, on the part of the townships, to retain the taxes in controversy, and they were properly paid into the state treasury. Having been so paid, the general assembly, under the former rulings of this court, had no constitutional power, by law, to refund them to the townships to whose use this proceeding is instituted.

Section 53, article 4, of the constitution of 1875, among other things, provides that: "The general assembly shall not pass any local or special law, * * * remitting fines, penalties, and forfeitures, or *refunding moneys legally paid into the treasury*." If the act in question can be regarded as a special law, it is clearly obnoxious to the constitutional provision above quoted; and if it must be regarded as a general law, then it is clearly invalid under the ruling in the case of *Webb v. Lafayette County*, *supra*, and, also, by force of sections

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45, 46, and 47, fourth article of the constitution of 1875, above referred to. If the legislature had no power to enact such a law, it follows that the court has no authority, by mandamus or otherwise, to compel the state auditor to do what the constitution says shall not be done.

For these reasons the respondent's demurrer to relator's petition is sustained, and the peremptory writ denied. All concur.

THE STATE V. BURNS, *Appellant*.

1. **Practice, Criminal : JUROR : CAUSE OF CHALLENGE.** The expression of, or the existence of bias, or prejudice, against crime, constitutes no cause of challenge of a juror.
2. — : — : — : **WAIVER.** A defendant who hears expressions of prejudice against himself by a juror, constituting any ground of objection, and who fails to communicate them to his counsel, so that proper steps can be taken, is guilty of inexcusable negligence.
3. **Presumption : BURDEN OF PROOF.** Every presumption attends the acts and doings of a court of general jurisdiction, and a party who asserts that error has been committed, must prove it.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Sidney F. Andrews for appellant.

(1) On the trial of this cause defendant was entitled to a panel of thirty-four competent and qualified jurors, from which to select the trial jury, or from which to make his peremptory challenges. R. S., sec. 1903; *State v. Waters*, 62 Mo. 196; *State v. Davis*, 66 Mo. 684; *State v. McCarron*, 51 Mo. 27. (2) Charles Tacke, one

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of the members of the panel from which the jury who tried the cause was selected, was an incompetent juror, and disqualified from sitting on said panel. R. S., sec. 1897; *State v. Burnside*, 37 Mo. 343; *State v. Wyatt*, 50 Mo. 309; *State v. Taylor*, 64 Mo. 358. (3) It was the duty of the said Charles Tacke to disclose on his *voir dire* examination any prejudice, or bias, he may have entertained against defendant. *State v. Taylor*, 64 Mo. 358; *State v. Ross*, 29 Mo. 32. (4) This incompetent juror was challenged peremptorily by the defendant, who, without fault on his part, did not know of said incompetency at the time of making said challenge, and who thereby was deprived of, or wasted one of, his twelve peremptory challenges. *State v. Hays*, 28 Mo. 287; *State v. Klinger*, 46 Mo. 224; *State v. Barton*, 71 Mo. 294.

B. G. Boone, Attorney-General, for the state.

(1) The remark attributed to the juror does not show that he was biased, or prejudiced against the defendant. It was general in its nature, and had no reference to defendant. In the language of the court of appeals: "It was nothing more than the uttering, in rude and low language, of a sentiment which every honest man in a community feels." (2) The defendant was not prejudiced by the remark of the juror, because the latter was peremptorily challenged, and he was not one of the panel which tried the cause, as in the *State v. Burnside*, 37 Mo. 343; *State v. Wyatt*, 50 Mo. 309, and *State v. Taylor*, 64 Mo. 358. (3) The defendant's constitutional right to a trial by an impartial jury, was not limited, or impaired, as in the cases cited above. (4) The juror (Tacke) was free from bias or prejudice, and the remark attributed to him would not have been sufficient to justify a challenge for cause (section 1897, Revised Statutes), and the defendant was not deprived of one of his peremptory challenges by reason of said juror being

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on the original panel. (5) Where it appears from the record, as in this case, that the defendant was not deprived of the privilege of making the full number of statutory challenges, or that he suffered no prejudice, in the least, from the course that was pursued, this court will not reverse. *State v. Klinger*, 46 Mo. 226. (6) The record shows that the defendant had a fair trial, and was found guilty by a jury of twelve good and lawful men, duly elected, tried and sworn to try the cause. No error was committed in violation of any rule of law, and nothing occurred which could, by any possibility, have prejudiced the defendant, and there can be no grounds for reversal. *State v. Holme*, 54 Mo. 160.

SHERWOOD, J.—The defendant was indicted for the crime of robbery, and being tried, was found guilty, and his punishment assessed at ten years' imprisonment in the penitentiary. As the evidence upon which the conviction was founded, is not preserved, the only point for consideration is the denial, by the court, of the defendant's motion for a new trial, based upon the remark made by Tacke, after he and others had been sworn on their *voir dire*, and, having answered satisfactorily, were awaiting the completion of the panel of thirty-four, from which the jury were to be drawn, when Tacke made this remark: "*There is a living for every one in this country, and all these thieving sons of b—s ought to be sent up.*" This remark was unknown to counsel of defendant until after the trial was over, and forms the ground for the motion for a new trial.

The expression, or the existence of bias, or prejudice against *crime* constitutes no cause of challenge. *Davis v. Hunter*, 7 Ala. 135; *Williams v. State*, 3 Kelly 453; *Albrecht v. Walker*, 73 Ill. 69; *Kroer v. People*, 78 Ill. 294. Besides, although the remark of Tacke was not heard by *defendant's counsel*, *non constat*, but that it

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was heard by *defendant himself*. If it was heard by defendant himself, and constituted any ground of objection to Tacke, then defendant was guilty of inexcusable negligence in not communicating the fact to his counsel, so that the proper steps could be taken. As there is no evidence preserved in the record; as it does not appear in what connection the words in question were spoken; as every presumption attends the acts and doings of a court of general jurisdiction; as a party who asserts that error has been committed, must prove it, we find nothing in the record, taking it as a whole, to warrant a reversal of the judgment, and so we affirm it. All concur.

BAIER *et al.*, v. BERBERICH *et al.*, *Appellants*.

1. **PRACTICE : EVIDENCE : APPEAL.** The specific error complained of as to the admission or exclusion of evidence must be pointed out or the objection will not be considered on appeal.
2. — : **MOTION FOR NEW TRIAL.** The defence that another action is pending between the same parties for the same cause of action cannot be made for the first time in the motion for new trial.
3. — : **PARTIES : WAIVER.** Unless the objection as to the insufficiency of parties is made by demurrer or answer, it is waived.
4. — : **PLEADING : EQUITY.** A petition which alleges a fraudulent combination by which the defendants procured a sale of property under a deed of trust and became the purchasers, presents a case for equitable relief in favor of the owner of the equity of redemption. *

Appeal from St. Louis Court of Appeals.

AFFIRMED.

* These syllabi are taken from 13 Mo. App. 587.

Baier v. Berberich.

Virgil M. Harris for appellants.

Kehr & Tittmann for respondents.

HENRY, C. J.—In a suit instituted by these plaintiffs against Jno. C. Berberich, which was finally determined by this court, it was decided that Berberich held the property in controversy, as trustee for Mrs. Baier. The case is reported in 77 Mo. 413. In addition to the facts therein stated, the following facts appear in this record: Pending that suit, Berberich made an arrangement with Ponath and Price to purchase a note, which he had made for borrowed money, and executed a deed of trust upon his property to secure, and with notice of the pendency of this suit, and of the title of Mrs. Baier, they had the property sold, by Haagsma, a trustee under Berberich's deed of trust, and purchased it, and claim it against Mrs. Baier, who by this suit seeks to have them declared to be trustees for her, and asking that she may redeem the property by paying the balance due on the Berberich note. Plaintiffs had a judgment in the circuit court, which, on appeal to the St. Louis court of appeals, was affirmed, and it is here on defendants' appeal from the latter judgment.

We are satisfied that the disposition of the cause by the court of appeals was eminently just. The evidence clearly establishes the material allegations in the petition. It leaves no room for doubt that the pretended purchase, was in reality, a payment of the Berberich note, and was a scheme concocted by Berberich, Ponath and Price to defeat the equitable title of Mrs. Baier, of which Price and Ponath had notice. The judgment affirmed. All concur.

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THE STATE V. LETT, *Appellant*.

1. **Practice, Criminal: CONTINUANCE.** An application for continuance under Revised Statutes, section 1884, which states the facts defendant expects to prove by the absent witnesses, but fails to state that he is unable to prove them by any other witness whose testimony could be as easily procured, is fatally defective and should be denied.
2. ———: **EVIDENCE.** Defendant in a criminal case cannot complain of an error in the admission of evidence in his own favor.
3. ———: ———: **OBJECTION.** The Supreme Court will not pass upon the admissibility of evidence where the record shows that it was received without objection.
4. ———: ———. It is competent for the state in a criminal prosecution to offer evidence for the purpose of identifying the instrument with which the crime was committed, and failing in this, to withdraw the evidence, in a case where it is immaterial and not prejudicial to the defendant.
5. ———: **INSTRUCTION.** It is proper to instruct the jury that if a witness wilfully swears falsely to any material fact in the case, they may disregard his entire testimony, but this rule cannot be applied to a case of mere mistake on the part of the witness.

Appeal from Carroll Circuit Court.—HON. J. M. DAVIS,
Judge.

AFFIRMED.

J. W. Sebree for appellant.

The court erred in overruling defendant's application for continuance. *State v. Woods*, 68 Mo. 444, *et seq.* The state had no right to admit what the absent witnesses would swear to, if present. *State v. Hickman*, 75 Mo. 416; *Chambers v. Smith*, 30 Mo. 156. Instruction number seven, given for the state, was erroneous in telling the jury they might disregard the whole of the testimony of any witness who had sworn falsely. The word *wilful* should have been in the instruction. *State v.*

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Elkins, 63 Mo. 163, 167. The facts in this case did not justify an instruction on the subject of credibility of witnesses. *Railroad v. Murdock*, 62 Mo. 74; *White v. Maxey*, 64 Mo. 559; *Nichols v. Winfrey*, 79 Mo. 551. The court should have instructed the jury that Davis' testimony could only be received as contradictory. *State v. Swain*, 68 Mo. 615. The testimony of Bryant as to seeing defendant in the saloon with a knife an hour before the difficulty, was illegal, and no part of the *res gestæ*. *State v. Evans*, 65 Mo. 579; *State v. Adams*, 76 Mo. 376; *State v. Guy*, 69 Mo. 430. This testimony could not be withdrawn by instruction. *State v. Blan*, 69 Mo. 324; *State v. Rothchild*, 68 Mo. 55. The expert testimony of Dr. Waggoner was illegal. It was the duty of the court to instruct the jury upon the whole case, whether the defendant asked it or not. *State v. Banks*, 73 Mo. 596. The indictment charges that the knife was a deadly weapon and it devolved upon the state to prove it. *Car-rico v. State*, 11 Mo. 580; *State v. Nueslein*, 25 Mo. 111. The verdict of the jury ought to show of what degree of assault to kill they found defendant guilty. R. S., sec. 1927. The record does not show that defendant was in court to make his challenges to the grand jury which found a true bill against him. R. S., sec. 1772; Bishop on Crim., sec. 745, p. 746, note 1.

B. G. Boone, Attorney General, for the state.

(1) Defendant's application for continuance was defective in failing to state that he was unable to prove the facts therein contained by any other witness whose testimony could be as readily procured. R. S., sec. 1884. It was properly overruled. (2) The refusal of the court to grant a continuance, not being relied on in the motion for a new trial, will not be reviewed by this court. *State v. Mann*, 83 Mo. 589. (3) The court did not err in admitting the testimony of the witness, Charles Davis, contradicting or impeaching the state-

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ment of Montgomery. The affidavit was a sufficient foundation for its introduction. *State v. Miller*, 67 Mo. 608; *State v. Mann*, *supra*. (4) The court did not err in selecting bystanders to fill vacancies on the grand jury. Section 1771, R. S., 1879, page 300. From the whole record in this case it appears that the defendant had a fair trial and the conviction was proper.

NORTON, J.—The defendant was indicted in the circuit court of Carroll county, at its December term, 1884, under section 1262, Revised Statutes, for an assault to kill one Jacob Koons. The indictment was returned on the fifth day of December, 1884, and the trial had on the eleventh day of the same month, resulting in the conviction and sentence of defendant to the penitentiary for the term of six years, from which judgment defendant has appealed to this court.

The first error assigned is, the action of the court in overruling defendant's application for a continuance. It is provided by section 1884, Revised Statutes, that an application for continuance, which is based upon the absence of material witnesses, must state, among other things, "what facts he believes the witness will prove, * * * and that he is unable to prove such facts by any other witness whose testimony can be as readily procured." The affidavit of defendant filed in support of his motion for continuance, while it states what facts he expected to prove by the absent witness, is fatally defective in not containing the further statement, required by the statute, that he was unable to prove such facts by any other witness whose testimony could be as readily procured, and for this reason, if for no other, the application was properly overruled. Notwithstanding it has been held by this court in the cases of *State v. O'Connor*, 65 Mo. 374, and *State v. Hickman*, 75 Mo. 416, that it is only when a good ground for continuance has been shown that the admission of the prosecuting attorney that the facts set out in the application shall be taken and

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received by the court and jury as the testimony of such absent witness, can be made and the trial proceeded with, without the consent of the defendant, still in this case the admission was made, and defendant on the trial had the benefit of it, though not entitled to it, under said rulings, his application, as we have seen, being fatally defective. This, however, was an error against the state and in defendant's favor, of which he cannot complain.

It is also insisted that the court erred in allowing a witness to state that defendant, about an hour before the difficulty in which Koons was cut, was seen in a saloon with a knife, and said he was going to cut some one with it. It is sufficient to say of this objection that the record shows, and so states that this evidence was received without objection. It is not objected that the court erred in allowing witness, Davis, to testify that a knife which he exhibited in court was handed him by a Mr. Wilson, who told him he picked it up east of the place where the difficulty occurred, soon after it occurred. Wilson was then called, who stated that he did pick up the knife at the place and time mentioned by Davis. The state being unable to identify the knife as the property of the defendant, withdrew the evidence by permission of the court, and the court, at the instance of the defendant, instructed the jury that the evidence was not before them for consideration. It was perfectly competent for the state to offer the above evidence, with the view of showing that the said knife was the property of the accused, and, failing in this, to withdraw the evidence. The evidence of Dr. Waggoner shows that Koons was cut in the groin, that the cut was about three inches long, went into the hollow and that his entrails protruded through it. Whether such cut was inflicted with the particular knife to which the evidence related, or some other, was of no consequence, and we cannot see how the admission made by the state that it had failed

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to prove that the said knife was the property of defendant, could possibly have prejudiced him.

It is also insisted that the court erred in allowing the state to call one Davis to contradict the statement of one Montgomery read to the jury from defendant's application for a continuance. It will be sufficient to say of this, that the evidence of Davis did not contradict the statement of Montgomery, but in fact corroborated it, and if error was committed in allowing Davis to be called for that purpose, the evidence actually given was not prejudicial, but beneficial to defendant.

The instructions given by the court are such as have received the repeated sanction of this court, and, for that reason, need not be more particularly specified. In the seventh instruction the jury are told that if they believe any witness has testified falsely to any material fact they were at liberty to disregard the whole or any part of the evidence of such witness. We are cited to the case of *State v. Elkins*, 63 Mo. 159, as condemning such an instruction, as the one above noted. In the case cited, the jury were told that if they believed any of the witnesses swore falsely, "or were mistaken" as to any fact, they were at liberty to disregard the whole or any part of such evidence. This instruction was condemned on the express ground that it contained the words, "or were mistaken," the court observing that the doctrine is well settled, that when "a witness wilfully swears to a falsehood, his entire testimony may be disregarded." * * * But this was never applied to a case of mere mistake. Men of the greatest uprightness, and of the most unquestionable veracity are frequently mistaken, and yet no one would ever think of disregarding or setting aside their entire testimony on that account."

Perceiving no reversible error in the record, the judgment is affirmed. All concur.

Brewington v. Jenkins.

BREWINGTON, *Appellant*, v. JENKINS.

1. **Evidence: PLAT: MEMORANDUM.** A plat which has not been executed or acknowledged as the law requires, can have no intrinsic value as a legal plat or record, and is not competent evidence to establish the location of a disputed line. But where the evidence tends to show it has been referred to in descriptions contained in deeds already introduced, it should, with other pertinent evidence, be admitted as a memorandum tending to locate the several parcels of land designated.
2. **Practice: EVIDENCE: DEMURRER.** There being evidence to establish both sides of an issue, whether much or little, the legal right to take the verdict of a jury upon it, cannot be denied.

Appeal from Hannibal Court of Common Pleas.—HON.
THEO. BRACE, Judge.

REVERSED.

T. H. Bacon for appellant.

(1) The court erred in excluding the certified copy of the plat in identification of the lines of the out-lots mentioned in the deeds. On this plat the north and south lines dividing lots two, three and four on the west, and lots five, six and seven on the east, also separated therein the abbreviation "qr." on the west from the abbreviation "sec. twenty" on the east thereof, thus showing the lot lines coincident with lines of sectional division. In the deed of Stephen Glascock and the partition deeds of his grantees these lots were located in said northwest quarter, and the evidence identifying said plat as a diagram of the lots referred to was sufficient to warrant its admission. A deed of lots on an unrecorded plat will convey the title (*Mason v. Pitt*, 21 Mo. 189), and the lines in the plat must yield to the deeds. *Mincke v. Skinner*, 44 Mo. 92; *Neenan v. Smith*, 50 Mo. 525. The tax receipts *prima facie* established the boundaries of the

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out-lots. *St. Louis, etc., v. Risley*, 40 Mo. 356. So the popular recognition of the lots is sufficient to identify them. *Shewalter v. Pirner*, 55 Mo. 218; *Webster v. Blount*, 39 Mo. 500. (2) The court erred in sustaining the objection to the question to defendant as to his knowledge of the location of the north and south center line of section twenty. (3) The court erred in instructing the jury to find absolutely for the defendant, and in overruling motion to set aside non-suit. *Kelley v. Hannibal, etc.*, 70 Mo. 604, 605; *Woods v. Atlantic*, 50 Mo. 112, 116, top.

D. H. Eby for respondent, filed no brief.

DEARMOND, C.—This is an action of ejectment against David Jenkins for four acres of land just inside the corporate limits of the city of Hannibal. Plea general denial, the ten year statute of limitations, and adverse possession by defendant, Jenkins, since 1866. Judgment for defendant and appeal by plaintiff. Since the appeal defendant, David Jenkins, died, and his heir, Rose E. Jenkins, and his widow, Sylvania Jenkins, have succeeded him as parties defendant.

Plaintiff introduced documentary evidence tending to show title in himself to lots ten, eleven and twelve, as a designated part of the northeast quarter of section twenty, township fifty-seven, range four, west, and in defendant, David Jenkins, to lots five and six, as being in the northwest quarter of the same section and immediately west of and adjoining said lots eleven and twelve. He claimed that defendant's fence was one hundred and twenty-six feet east of the true line between their respective lots, and for the strip, 1320 feet long from north to south, and one hundred and twenty-six feet wide from east to west, he sued. He introduced oral evidence tending to show the location of the tracts designated as lots ten, eleven and twelve, and of those designated as lots five and six, and that the dividing line aforesaid ran through defendant's enclosure, one hundred and twenty-six feet

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west of defendant's fence.' He also introduced tax receipts showing that he and those under whom he claimed had for many years paid the taxes on all the lots in the northeast fractional quarter of said section twenty. Also evidence tending to show that defendant recognized that his fence was beyond his line, and that he had no right to such portion of his inclosure as lay east of the north and south center line through said section twenty, and had asked that he be not required to move his fence in saying that he would buy the northeast quarter of section twenty, whenever it was put on the market. The plaintiff offered in evidence a certified copy of an old plat, filed for record and recorded in the recorder's office in Marion county in 1847. This plat was not made by any owner of the lands platted, nor was it acknowledged by anybody. It purported to have been made and filed by one Draper, as agent, and "for reference." It showed sub-divisions of a section twenty and adjoining sections, corresponding in numbers and relative location, and to some extent in area, to the lots above mentioned, but it did not specify in what township or range the sections or lots were situated. It gave corners, trees, monuments, etc., in the way usual in surveys. This plat was rejected.

David Jenkins, testifying in his own behalf, said he bought his property in 1866, and that his east fence was then, and ever since had been, in the place where it was at the time of the trial. That he understood the east fence was on the line, and bought with that understanding. That ever since his said purchase he had occupied and used the land in dispute, openly, as his property, and had never recognized the right of anyone to claim it against him. He introduced other evidence tending strongly to support his plea of open, continuous, adverse possession from the date of his purchase, in 1866. At the conclusion of the evidence the court gave this instruction:

"The court instructs the jury that upon the whole

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of the testimony in this cause the plaintiff cannot recover, and they will find for defendant."

I. The rejected plat, not having been executed or acknowledged as the law required, could not have intrinsic value as a legal plat or record. It was not competent evidence to establish the location of the disputed line. But, the evidence tending to show that reference was made to it in descriptions contained in deeds already introduced, it should, as a memorandum, have been admitted with other pertinent evidence, as tending to identify and locate the several parcels designated as lots five, six, eleven and twelve.

II. The evidence on the part of defendant, David Jenkins, tended very strongly to establish title in him, at least by adverse possession. But other evidence tended to show that his long occupation of the disputed territory was not adverse, but subordinate to the recognized right and title of plaintiff's grantors. That he had recognized their superior title and had held by sufferance, or as under a license from them. It is not material what we might conclude upon a consideration of all this evidence. There being evidence, much or little, each way, the legal right to take the verdict of a jury upon it cannot be denied. Nor can we assume that to the jury the evidence in this case would have appeared as it so clearly did appear to the court. *Smith v. Hutchison*, 83 Mo. 683.

The judgment should be reversed and the cause remanded. All concur.

The State ex rel. Spickerman v. Fox.

THE STATE *ex rel.* SPICKERMAN V. FOX, *Judge.*

Prohibition. A writ of prohibition denied in this case, the object of which was to prohibit a circuit judge from further proceeding in a *habeas corpus* matter pending before him.

Prohibition.

WRIT DENIED.

J. P. Johnson and *D. H. McIntyre* for relator.

J. E. F. Edwards, Emerson & Cahoon for respondent.

HENRY, C. J.—This is an original proceeding in this court, the object of which is to prohibit Judge Fox from further proceeding in a *habeas corpus* case pending before him. We have not been favored with a statement of the case by either side, and have, consequently, been compelled, in order to learn the facts, to read a very lengthy petition written in a hand almost as difficult to decipher as the hieroglyphic inscriptions upon Egyptian monuments. What we make of it is this: The relator was appointed guardian of John Dasch, an infant, by the probate court of Madison county, in April, 1883, and in 1884, the mother of the infant appeared and filed her motion to set aside said order appointing relator guardian, which was sustained. Relator asked that an appeal be allowed him from the rescinding order to the circuit court, which was refused by the said probate court, and thereupon, he instituted a proceeding in the circuit court of said county to compel the allowance of his appeal. There was a judgment against him in the circuit court in that proceeding, from which he appealed to this court. Pending this mandamus cause, the mother of the child

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sued out of the circuit court a writ of *habeas corpus*, the object of which was to get the child out of relator's custody, who, in his return to that writ, gave a detailed history of the litigation up to that time, alleging the invalidity of the order of the probate court rescinding that appointing him guardian, charging that the person claiming to be the mother of the child (her name we have not been able to make out), was not in fact its mother; that she is an unfit person to be entrusted with its care and custody; that, in her motion to set aside the order vacating the order appointing relator guardian, she asked for the custody of her child, which was refused. This last matter, we take it, is pleaded as *res judicata*.

In this petition, after going over the whole ground, it is alleged that in said *habeas corpus* cause before Judge Fox, the return of the relator herein was filed on the twenty-ninth day of September, 1884, and, on that day, he filed an application for a continuance of said cause, in order to enable him to make preparation for a trial, and prepare for his defence, which was refused. Whether he asked a continuance to the next term, or for what length of time, is not stated. Whether there were any absent witnesses whose attendance he wished to procure, he does not state, nor is anything stated in this connection to show that the judge acted arbitrarily or oppressively. The cause was tried, and the court, having heard all the testimony adduced, announced that he would take the case under advisement until the fifteenth of December, 1884, and would then determine it, and, while said judge had the matter thus under advisement, this proceeding was instituted.

There are no facts alleged in this petition of an issuable nature, relating to the custody of the child, that were not in issue in the *habeas corpus* case. Whether the person claiming the custody of the child is its mother; whether she is a fit person to have that custody; whether the proceedings in the probate court were valid

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or invalid were all in issue in the *habeas corpus* case. The court in which it originated, and the judge of that court have jurisdiction of the cause and no sufficient reason is shown why he should be prohibited from proceeding to judgment therein.

The pendency of relator's mandamus case is no reason for the extraordinary step which this court is asked to take in this proceeding. In that cause all that will be finally determined is that relator had, or had not, the right to an appeal from the order of the probate court, rescinding the order appointing him guardian of the child. If that appeal be allowed him, no one can tell when the controversy will come to an end, and, on such a plea he might, for an indefinite period, retain the custody of a child, against its natural guardian. We think that the circuit judge should not be interfered with in his proceedings by this court. If he can be prohibited on the facts alleged, then it will not be long until it will not be unusual, but common practice in this court, to prohibit judges of other courts from proceeding to hear and determine causes under the *habeas corpus* act. Nor does it follow that, if the court finds that the relator is not entitled to the custody of the child, it will place it in the custody of the mother. The law authorizes the court, or magistrate, to "dispose of the prisoner as the case shall require."

The writ is denied and the petition dismissed. All concur.

Ewing v. Hoblitzelle.

EWING, Mayor, v. HOBLITZELLE, Recorder, Appellant.

1. **Constitution : STATUTES.** An act of the legislature must appear to be unconstitutional beyond a reasonable doubt before the judiciary will pronounce it invalid for that reason.
2. **Statute : SINGLE SUBJECT ; TITLE : CONSTITUTION.** When all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or the means of accomplishing it, then the subject is single within the meaning of the constitution, that no bill except the general appropriation bill, shall contain more than one subject, and if the latter is sufficiently expressed in the title, the statute is valid.
3. ——— : ——— : ——— : ———. The act of the legislature of March 31, 1883 (Laws, p. 38), which provides, and so expresses in its title, "for the registration of all voters in cities having a population of more than one hundred thousand inhabitants, and to govern elections in such cities and to create the office of recorder of voters," is not obnoxious to the inhibition of the constitution, that no bill shall contain more than one subject which shall be clearly expressed in the title.
4. **Constitution : SPECIAL LAW.** Such act is not unconstitutional as being a special law, because, first, section 5, article 8, of the constitution, not only confers on the legislature the power to pass such a law, but expressly commands the exercise of the power, and, second, because the act is not restricted or limited in its operation only to cities having a population of over one hundred thousand at the time it was passed.
5. ——— : ———. A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class, is a special one.
6. **Charter of St. Louis : CONSTITUTION.** Said act of March 31, 1883, is not invalid as being in conflict with the provisions of the constitution authorizing the voters of the city of St. Louis to frame and adopt a charter for its government, such charter and amendments thereto being by express provision of the constitution subordinate to the constitution and laws of the state.

Appeal from St. Louis Court of Appeals.

REVERSED.

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Glover & Shepley and *G. H. Shields* for appellants.

(1) Every question of doubt should be resolved in favor of the validity of the statute (51 Mo. 82), because the power of the legislature is absolute, except when restrained by the federal or state constitution. 34 Barb. 138; *Cooley's Const. Lim.* 173. (2) The state legislature has power over all subjects on which its legislation is not prohibited. 15 N. Y. 303; 27 Barb. 593; 4 Mich. 244; 5 Mich. 257; 24 N. Y. 497, 504; 2 Park, Cr. R. 490; 15 La. Ann. 190; 18 Ind. 258; 17 Cal. 547; 17 Pa. St. 119; 19 Pa. St. 260; 52 Pa. St. 477; *Cooley's Const. Lim.*, 1868, 173, 174. (3) Should the legislature attempt to grant a municipal corporation powers irrevocable by itself, they would be, notwithstanding, under the control of the legislative power. 10 How. 511; 3 Bland (Md. Ch.) 407; 13 Wend. 331; 9 Mo. 507; 29 Vt. 12; 13 Ill. 30; 2 Allen 27; 1 La. Ann. 162; 5 La. Ann. 665. No sovereign state ever sat up an independent principality, an *imperium in imperio*, such as Mr. Bell contends St. Louis to be, within its borders. (4) We must look to the constitution and that alone, to find provisions which emancipate St. Louis and its charter from the control of the legislature. *Brown v. Fifield*, 4 Mich. 322. The state did not, in the constitution, resign its functions over the territory of the city of St. Louis. Const., art. 9, secs. 20 and 23; art. 4, sec. 53; art. 9, secs. 7 and 22; *Town of Marietta v. Fearing*, 4 Ohio 427. (5) The registration of voters, the conduct of elections, including the appointment of judges of elections, and the canvass and returns thereof, are not incongruous subjects, but are germane to each other, are properly included in one act, and are clearly expressed in the title of the act in question. *State v. Ranson*, 73 Mo. 78; see, also, *Frost v. Wilson*, 70 Mo. 664; *State v. Matthews*, 44 Mo. 523; *State v. Bank of*

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the State of Mo., 45 Mo. 528; *City of St. Louis v. Tiffel*, 42 Mo. 578; *State v. Shepherd*, 74 Mo. 310; *State v. Chambers*, 70 Mo. 625. The act of the general assembly involved in this suit is not a special or local law. *State v. Toole*, 71 Mo. 665; *State ex rel. Monohan v. Walton*, 69 Mo. 556; *State ex rel. Berry v. Shields*, 4 Mo. App. 259.

Leverett Bell for respondent.

(1) Injunction is the proper remedy in this case. *Bradley v. Commissioners*, 2 Humph. 428; *Kerr v. Trego*, 47 Pa. St. 292. (2) The act of March 31, 1883, (Laws of 1883, p. 38), contravenes section 28, article 4, of the constitution, which provides that no bill, except a general appropriation bill, shall contain more than one subject, which shall be clearly expressed in its title. It embraces two distinct subjects. It provides for the registration of voters, by sections one to seventeen inclusive; and the remaining sections of the act relate to the manner of conducting elections in St. Louis. The subjects are separate and independent. *State v. Persinger*, 76 Mo. 346; *Cooley's Const. Lim.* (5 Ed.) 178; *People v. Parks*, 58 Cal. 624; *Huber v. People*, 49 N. Y. 132; *Murphy v. State*, 73 Tenn. 373; *State v. Barrett*, 27 Kan. 213; *San Antonio v. Gould*, 34 Texas 49; *Stewart v. Father Matthew Society*, 41 Mich. 67; *In re Paul*, 94 N. Y. 497. (3) It is repugnant to section fifty-three, of article four of the constitution, which provides that the general assembly shall not pass any local or special law regulating the affairs of cities, changing the charters of cities, providing the manner of conducting elections, or fixing or changing the places of voting, creating offices or prescribing the powers and duties of officers in cities. *State, etc., v. Hermann*, 75 Mo. 340; *Devine v. Cook County*, 84 Ill. 590. It cannot, so far as it attempts to authorize the recorder of voters to appoint the judges and clerks of election, be supported under section five, of article eight,

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of the state constitution, because the above feature is independent of and is not lawfully incorporated in an act to provide for the registration of voters. The registration of voters is one thing, and the method of conducting an election and canvassing the returns is another, and distinct and separate subject matter. (4) It violates sections 20, 21, 22, 23, 24, and 25, of article 9, of the state constitution, which confer on the people of St. Louis the right of self-government in matters of local concern, and it is in effect an amendment to the charter of St. Louis, not authorized by said sections of the constitution. The present charter of St. Louis was adopted by the vote of the people of the city on August 22, 1876, and it went into effect at the end of sixty days thereafter. It has been before the court in a number of cases, and its provisions have always been upheld. *State v. Powers*, 68 Mo. 320; *St. Louis v. Sternberg*, 69 Mo. 289; *State v. Walsh*, 69 Mo. 409; *St. Louis v. Green*, 70 Mo. 563; *State v. Mayor*, 73 Mo. 435; *St. Louis v. Knox*, 74 Mo. 79; *Ex parte Hollwedell*, 75 Mo. 395; *St. Louis v. Richeson*, 76 Mo. 470; *St. Louis v. Bircher*, 76 Mo. 431; *Eyerman v. Blakesley*, 78 Mo. 145; *Farrar v. St. Louis*, 80 Mo. 379; *State, etc., v. Smith*, 81 Mo. 51. (4) The purpose of section 25, article 9, of the constitution which reserves to the state general assembly "the same power over the city and county of St. Louis that it has over other cities and counties of the state," was to reserve to the state the right to legislate as to matters in St. Louis of state concern. The question, who shall appoint judges and clerks of election at a special election in the city of St. Louis, held pursuant to its charter and ordinances for the purpose of filling a local city office, is one in which the state has no interest, and as to which it is forbidden to legislate, and the charter having vested the power of appointment in the mayor, the state legislature has no power to transfer it to the recorder of voters. (5) Under the system of government prevailing in Missouri, the powers and duties designated in the act of 1883, to be exercised

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by the recorder, are required to be distributed, and cannot lawfully be exercised by the same person. (6) Under the law of the land, the legislature has no power to order and direct the disbursement of money raised by taxation in the city of St. Louis for local municipal purposes, in the manner and for the objects set forth in the said act of March 31, 1883. Cooley on Const. Lim. (5 Ed.) 285. The question of the salary and compensation to be paid out of the city treasury to the recorder of voters, and the deputies and clerks employed in his office, is one of exclusively local concern which the state has no right to interfere with and control by compulsory legislation. *People v. Common Council*, 28 Mich. 228; *People v. Mayor*, 51 Ill. 17. The city of St. Louis by its charter is authorized to establish and fix the salaries and compensation of all officers, deputies and clerks employed by the city in any of its offices or departments. Part 8, sec. 26, art. 3, 2 R. S. 1587; Sec. 17, art. 16, 2 R. S. 1629. The act of March 31, 1883 (Laws of 1883, 38), contravenes section 28, of article 4, of the state constitution, which provides that no bill, except a general appropriation bill, shall contain more than one subject, which shall be clearly expressed in its title. The act embraces two distinct, separate and independent subjects. It provides for the registration of voters, by sections one to seventeen inclusive and by section twenty-five; and sections 18, 19, 20, 21, 22, 23, 24, 26, and 27, of the act relate to the manner of conducting elections in St. Louis. The subjects are distinct, separate and independent. *State v. Persinger*, 76 Mo. 346; Cooley's Const. Lim. (5 Ed.) 178; *People v. Parks*, 58 Cal. 624; *Huber v. People*, 49 N. Y. 132; *Murphy v. State*, 73 Tenn. (9 Lea) 373; *State v. Barret*, 27 Kan. 213; *San Antonio v. Gould*, 34 Tex. 49; *Stewart v. Father Matthew Society*, 41 Mich. 67; *In re Paul*, 94 N. Y. 497.

NORTON, J.—This is a proceeding by injunction, instituted in the circuit court of the city of St. Louis, to enjoin and restrain defendant from appointing four

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judges and two clerks to serve at each election precinct in the city of St. Louis, at a certain election to be held in said city. A demurrer was interposed to the petition by defendant, which was sustained by the circuit court and the bill dismissed. On appeal to the St. Louis court of appeals said judgment was reversed, and the right of plaintiff to the relief prayed for asserted, from which judgment defendant has appealed to this court.

It is substantially averred in plaintiff's petition that he was the mayor of the city of St. Louis, and that by virtue of section 15, article 2, of the charter of said city the duty is imposed upon him of appointing, at least ten days before every election held in said city, four competent persons to act as judges, and two persons to act as clerks at each election precinct in said city. It is further averred that an election was soon thereafter to take place in said city for the office of president of the board of assessors and that plaintiff was engaged in selecting and appointing the judges and clerks of said election. It is then averred that defendant, who is recorder of voters in said city, under an appointment from the governor of the state, threatened to appoint judges and clerks for said election, whereby great confusion and injury to the public would result. It is then averred that the act of the general assembly, approved March 31, 1883, under which defendant claims the right to exercise such power of appointment, is unconstitutional and void.

It will be seen from this statement that the question decisive of the case presented by the record, is this: Is the said act of 1883 constitutional? An affirmative answer to this interrogatory reverses, and a negative answer affirms the judgment of the court of appeals. As preliminary to the consideration of the question involved, and as indicating the rule for our guidance in determining it, it may be observed that, when we are called upon to declare an act of the legislature unconstitutional, which has been passed with all the forms and ceremonie

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requisite to give it force, the question should be approached with great caution and should be considered with the utmost care and deliberation. The nullity and invalidity of such a law must appear beyond a reasonable doubt before we can assume to pronounce it void. This rule is founded on the fact that the judiciary ought to accord to the legislature as much purity of purpose as it claims for itself; as honest a desire to obey the constitution, and, also, a high capacity to judge of its meaning. *State v. Able*, 65 Mo. 357; 43 Mo. 385; 48 Mo. 468; *State v. Ranson*, 73 Mo. 78. So much of the title to the act of 1883 here called in question as bears on the point raised is as follows: "An act to provide for the registration of all voters in cities having a population of more than one hundred thousand inhabitants, and to govern elections in such cities, and to create the office of recorder of voters." The first seventeen sections of the act relate to registration of voters and the appointment of recorder of voters; and the ten succeeding sections relate to the manner of conducting elections in such cities. It is contended by counsel that the registration of voters is one subject, and the governing of elections is another and distinct subject, each independent of and disconnected from the other, and that the said act is, therefore, violative of section 28, article 4, of the constitution, which declares that "no bill except general appropriation bills shall contain more than one subject, which shall be clearly expressed in the title." While it has been held in some of the states whose constitutions contain provisions like said section 28, article 4, that they are directory merely, the great weight of authority is to the effect that they are mandatory and must be complied with to make a valid law. But in the states where this has been held it is also held that an act containing provisions relating to matters which are germane to the general subject is not obnoxious to such constitutional inhibition, the object of such inhibition being to prevent the practice of joining in the same bills incongruous sub-

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jects having no relation or connection with each other, and not germane to the subject embraced in the title. In the case of the *State v. Miller*, 45 Mo. 497, it is said, in speaking of this subject, that "the courts in all the states where a like or similar provision exists have given it a very liberal interpretation, and have endeavored so to construe it as not to limit or cripple legislative enactments any further than was necessary by the absolute requirements of the law." And in Mr. Cooley's work on Constitutional Limitations, in treating of such a provision, it is said that "there has been a general disposition to construe the constitutional provision liberally, rather than embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it was adopted." Whether a provision of a statute is or not germane to the general subject, is determinable by a rule laid down by Mr. Sedgwick, in his work on Statutory and Constitutional Law, page 521, in note, which is as follows: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title the statute is valid."

As illustrative of the principle, reference may be made to the case of *Davis v. Woolnough*, 9 Iowa 104, where it was held that an act for revising and consolidating the laws incorporating the city of Dubuque and to establish a city court therein, was held to be valid, because establishing a city court was not a new subject, but a mere incident to the general subject stated in the title. So in the case of *Thomasson v. State*, 15 Ind. 449, an act for regulating the sale of liquor, may prohibit the giving of liquor to minors. No doubt can exist as to the constitutionality of the said act of 1883, in so far as it relates to the registration of voters in cities having a population in excess of 100,000, for by section 5, article 8, of the constitution, it is expressly declared

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that "the general assembly shall provide by law for the registration of voters in cities and counties having a population of more than 100,000 inhabitants, and may provide for such registration in cities having a population exceeding 25,000 inhabitants, but not otherwise." This section of the constitution, in so far as it relates to cities containing more than 100,000 inhabitants, is imperative and mandatory, and the legislature could not refuse to obey the mandate without disregarding a plain duty. It is to be observed that the article of the constitution in which the above section is found is headed "Suffrage and Elections," thus showing that the subject of voting was united or connected with elections at which the right to vote was to be exercised. But it is argued that, while so much of the act as relates to the registration of voters may find support in the constitutional provision above quoted, that all that part of the act which relates to governing elections must fall, for the reason that governing elections in such cities is an independent subject, and has no relation to the subject of registration of voters. The question whether this is so or not may be tested by the rule heretofore adverted to, viz.: "When all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or the means of accomplishing it, then the subject is single, and if sufficiently expressed in the title the statute is valid."

The object of the constitutional requirement that voters in cities of more than 100,000 inhabitants should be registered, was not simply to ascertain the number of voters in such cities, but for the sole purpose of ascertaining what persons were qualified to vote at elections to be held therein. It was intended that the registration of voters in such cities should be the first and initial step taken in order to have an election, and, in this view of it, elections in such cities may be said to "fairly relate to the registration of voters, and have not only a material, but necessary connection with it." For illustration:

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Suppose that under the act in question, which, as we have seen, is valid in all respects in so far as it relates to the registration of voters, and by which the right of persons to vote at elections held in such cities is ascertained, no registration of voters whatever should be made as is therein provided, the question would at once arise whether a valid election could be held for want of such registration. The registration of voters in such cities, whereby the right of the persons registered to vote is ascertained, and elections held therein at which the right thus ascertained is to be exercised, fairly relate to each other, and have a material and necessary connection with each other, and we perceive no such incongruity as counsel contend exists between the registration of voters and governing elections at which such registration lists are alone to be used by those conducting them, as renders the said act of 1883 obnoxious to the constitutional inhibition that "no bill shall contain more than one subject, which shall be clearly expressed in the title." In the case of *State ex rel. v. Mead*, 71 Mo. 266, it is expressly held that a provision in an act "concerning popular elections," authorizing the governor to fill vacancies in elective offices, is germane to the general subject and is valid.

It is also insisted by plaintiff that the said act of 1883 is a local and special law, and is, therefore, in contravention of section 53, article 4, of the constitution, which, among other things, provides that the general assembly shall not pass any local or special law regulating the affairs of cities, changing the charters thereof, providing the manner of conducting elections or fixing or changing the place of voting, creating officers, or prescribing the powers and duties of officers in cities. If the premise assumed by counsel that the law in question is a local or special law, be well founded, the conclusion contended for follows necessarily, but we think it has no foundation upon which to rest. The act in question, as we have seen, provides for the registration of

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voters in cities having more than 100,000 inhabitants, and the power to pass such a law is not only directly conferred by section 5, article 8, of the constitution, but the general assembly is expressly required and commanded to pass such a law; and in exercising the power thus conferred, and the duty thus enjoined, the legislature might, as it did, incorporate in the law such provisions as to make its exercise effectual for the purpose intended to be accomplished; and as such registration could not be accomplished without the designation of some officer upon whom the duty of making it is imposed, the power of the legislature to create the office, designate the officer, prescribe his duties, and provide for his appointment or election is necessarily implied from and included in the power expressly conferred to provide for such registration. The legislature, being thus empowered, had the right to include in the act for the registration of voters any subject naturally or necessarily connected with it or flowing from it as incident thereto, and, as elections have a necessary connection with the registration of voters, the sections of the act of 1883, relating to elections as well as those relating to the creation of recorder of voters, his appointment, and the duties he is required to perform, are not obnoxious to the constitutional prohibitions invoked by plaintiff. To give these prohibitions the scope claimed for them by counsel, as applying to the act of 1883, would be to make one section of the constitution nullify and wipe out another section of the same instrument. It is a sufficient answer to all the points and authorities cited in support of the position, that the act of 1883 is a local or special law, to say that no law can be either local or special within the meaning of the constitution, which results (as does the act of 1883), directly or indirectly from a specific constitutional requirement. We cannot construe the constitution as providing methods for setting aside its own commands. *State ex rel. v. Shields*, 5 Mo. App. 259.

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We are cited to the case of *State ex rel. v. Hermann*, 75 Mo. 341, as sustaining the proposition that the act of 1883 is a local law. In that case the act known as the notary public act was condemned on the express ground that by the very terms of the act it could not by any possibility apply to any other city than the city of St. Louis, and that it shut out from its operation any other city in the state which might in the future attain a population of more than 100,000; and the cases of *State v. Hammer*, 42 N. J. L. 435, and *Commonwealth v. Patton*, 88 Pa. St. 258, cited in the opinion, will show that the statutes in those cases were held to be invalid on the ground that by the terms of the statutes they could not operate in the future, but only on the existing condition of things at the time they were passed and took effect. But such is not the case with the act of 1883, for two reasons: first, because section 5, article 8, of the constitution, not only confers the power to pass such a law, but commands the exercise of the power thus conferred; and, second, because the act is not restricted or limited in its operation only to cities having a population of over 100,000 at the time it was passed, but applies to all cities in the state attaining such population in the future. That the act of 1883 was intended to apply to all cities that might in the future attain a population of more than 100,000, is evidenced by the fact that it requires the governor to appoint a recorder of voters "for each of said cities," and requires that the person so appointed should be a voter of the city for which he may be appointed. The rule as laid down by this court in the case of the *State v. Tolle*, 71 Mo. 650, is applicable to the said act of 1883. It is there held that a statute "which relates to persons or things as a class, is a general law, while a statute which relates to particular persons or things of a class, is special, and that classification does not depend on numbers;" see, also, *State ex rel v. Walton*, 69 Mo. 558.

The next and last objection to the validity of the act,

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which we shall notice, is that it is in violation of sections 21, 22, 23, 24, and 25, of article 9, of the constitution. It is argued that inasmuch as these sections authorized the voters of the city of St. Louis to frame and adopt a charter for the government of the city, which, when adopted in the manner therein provided, should take the place of and supersede the charter theretofore granted by the legislature and all amendments thereto, that as to all matters of local self-government an *imperium in imperio* was created, and as to such matters the city was emancipated from state and legislative control. These sections will satisfactorily show, if examined by themselves, and would show, were it in our province to examine them in the light of the debates, when they were the subjects of discussion in the convention which formulated the constitution, conclusively, that the chief object sought to be accomplished by them was not to emancipate the city from legislative control, but to allow it to enlarge its limits and cut it loose, when thus enlarged from the county, so as to free it from county government and exempt the property therein from taxation for county purposes. It is true that constitutional authority was given to the people of the city to frame and adopt a charter which should supersede the charter and all amendments to it in existence at the time of its adoption, but the idea that it was thereby intended to create a sovereignty, and deny to the state the right of control, is, we think, completely overthrown by the following limitations or conditions imposed by section 23, article 9 viz.: "Such charter and amendments shall always be in harmony with and subject to the constitution and laws of the state of Missouri." "Subject to," that is, placed under the authority, the dominion of the constitution and laws of the state. That it was never designed to free the city from state control is further shown by section 25, of article 9, which is as follows: "Notwithstanding the provisions of this article, the general assembly shall have the same

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power over the city and county of St. Louis that it has over other cities and counties of this state."

At the time of the adoption of the scheme and charter, there was, and is now, a law of the state in force providing for a board of police commissioners in the city of St. Louis, consisting of five persons, of whom the mayor of the city is one, and the other four appointees of the governor, and confirmed by the senate. These commissioners have control of the entire police force of the city, and are invested with large powers affecting the local government of the city. Suppose that the charter of the city when framed and adopted, in conformity with the scheme authorizing it, had contained a provision for a board of police commissioners, consisting of five persons, one of whom should be the mayor and the other four his appointees, and investing them with the same power of control over the police force of the city which the law of the state invested in those appointed by the governor, which would have prevailed, the law of the state or the charter provision? If the charter provision in that respect is to prevail the law of the state would then be subject to the charter in the face of the constitution, which declares that the charter shall be subject to the law of the state. Public corporations are the auxiliaries of the state in the important business of municipal rule and are called into being at the pleasure of the state, and the same voice which speaks them into existence can speak them out. *State ex rel. v. Miller*, 66 Mo. 328. And it was never intended by the constitutional provisions above referred to (as I have attempted to show), that the municipality of the city of St. Louis should rise higher than the fountain head. The state at large is as much interested in the method of conducting elections in said city, at which all state as well as municipal officers are elected, which method by the act of 1883 it assumes to pre-

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scribe, as it is in having a well regulated police in the city, which it has assumed to provide for in the law creating a board of police commissioners, who are state as well as municipal officers, and into whose hands the important trust is confided of controlling its police force.

We do not hold that the legislature in exercising the power referred to in section 25, article 9, of the constitution, can exercise it by the passage of a local or special law; but that it can do so by a general law we have no doubt, and when it is exercised, as we think it has been exercised in the act of 1883, by a general law, and such law is, in any of its provisions, in conflict with a charter provision that the law prevails over the charter in obedience to the mandates of the constitution that "such charter and amendments shall always be in harmony with and subject to the constitution and laws of the state."

The judgment of the St. Louis court of appeals, reversing the judgment of the circuit court, as well as the judgment rendered by said court of appeals in favor of plaintiff, is hereby reversed, the bill of plaintiff dismissed, and judgment entered in this court for the defendant. All the judges concur.

Coudy v. The St. L., I. M. & S. Ry. Co.

COUDY V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RAILWAY COMPANY, *Appellant*.

1. **Negligence: PLEADING.** A petition in an action by a passenger against a railroad for injuries resulting from its negligent management of its train is sufficiently specific in its averments of the acts constituting the negligence, which charges that "the defendant, by and through its servants, agents and employes in charge of and managing said train, negligently and unskilfully ran and managed the same in such a way as to cause the said train and the car in which the said plaintiff was being conveyed as to check its speed very suddenly and to jolt and pitch the same suddenly and with great force backward and forward in such manner and with such force as to cast and throw said plaintiff out of said car and upon the platform and from said platform onto the track of said railroad, under the said cars and train, by means and by reason of which said cars and train ran upon and over the left arm and left leg of the plaintiff."
2. **Demurrer to Evidence: NEGLIGENCE.** The trial court in this case did not err in overruling a demurrer to plaintiff's evidence interposed by defendant on the grounds that the evidence showed that plaintiff was guilty of contributory negligence, and that such evidence as to the manner in which the accident occurred was irreconcilable with the physical facts attending it.
3. **Jury, Province of.** It is for the jury and not for the court to pass on the credibility of witnesses; to determine the weight to be given to their testimony and to reconcile conflict therein.
4. **Carrier: PASSENGER, INJURY TO: BURDEN OF PROOF.** Where in an action by a passenger against a railroad for an injury received in operating its train, the occurrence of the injury through the mistake of the carrier is shown, a presumption of negligence arises against the latter, which casts upon it the burden of showing that the accident happened, notwithstanding the exercise on its part of the high degree of care which the law imposes on it.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

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Bennett Pike for appellant.

(1) The court erred in permitting, against the objection of defendant, the introduction of any evidence under the allegations of the petition, as it only contains a general charge of negligence, and under the rule adopted by our Supreme Court and the court of appeals, is fatally defective. *Waldhier v. The Han. & St. Joe R. R. Co.*, 71 Mo. 514; *Leduke v. St. Louis & Iron Mountain R. R. Co.*, 4 Mo. App. 485. (2) The plaintiff, upon his own testimony, ought not to recover, and the demurrer to the evidence, at the close of the plaintiff's case, should have been given. Wharton on Negligence, 363; *Adams v. R. R.*, 4 C. P. 739; *Geddes v. R. R.*, 103 Mass. 391. (3) The testimony of plaintiff, which was all the evidence in his behalf as to how the injury occurred, is absolutely irreconcilable with the physical facts surrounding the injury, and for this reason the court should have refused to submit the case to the jury. *Powell v. R. R.*, 76 Mo. 80; 21 Fed. Rep. 892.

Johnson, Lodge & Johnson for respondent.

NORTON, J.—This suit was instituted in the circuit court of the city of St. Louis by plaintiff to recover damages for personal injuries received by him while a passenger on one of defendant's trains, alleged to have been occasioned by the negligence of defendant in the management of its train. The answer was a specific denial of the facts alleged in the petition, and also set up contributory negligence on the part of plaintiff. On the trial plaintiff obtained judgment for \$6,000 damages, from which defendant appealed to the St. Louis court of appeals where the judgment was affirmed, from which defendant has appealed to this court.

The first point made in the brief of counsel is that the court erred in overruling defendant's objection to the introduction of any evidence under the petition, which

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objection was based on the ground that the petition only contained a general charge of negligence. This point is not well taken. The petition after setting out that plaintiff was a passenger on defendant's train, contains the following averments as to negligence, viz.: that "the defendant, by and through its servants, agents, and employes in charge of and managing said train, negligently and unskilfully ran and managed the same in such a way as to cause the said train, and the car in which the said plaintiff was being conveyed as aforesaid, to check its speed very suddenly, and to jolt and pitch the same suddenly, and with great force backward and forward, in such a manner and with such force as to cast and throw said plaintiff out of said car and upon the platform thereof, and from the said platform onto the track of said railroad under the said cars and train, by means and by reason of which the wheels of the said cars and train ran upon and over the left arm and left leg of the said plaintiff," etc. These averments sufficiently notified defendant of what it had to defend against, and could not, well be made more specific.

The next error assigned is the action of the trial court in overruling defendant's demurrer to the evidence at the close of plaintiff's case. The plaintiff, who was a boy fourteen or fifteen years of age at the time of the accident, testified as follows: "I was hurt August 25, 1880; was at that time living near Elwood station, Carondelet, and working on Third street and Chouteau avenue. I came up on the Iron Mountain road that morning; left home about six o'clock; my brother John came with me. I bought a ticket at Elwood station, and gave it to the conductor on the car that morning. I took a seat in the car the fourth from the last one in the train. I had three bundles right on the seat opposite me; one of them fell in the aisle, and as I raised to pick it up, there was a sudden jar, unusual, which threw me out. The seat I and my brother occupied runs parallel with the side of the car;

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the other seat to the right was cross-wise. The door opened on the opposite side east of me; the door was open at the time; the weather was warm. As I rose to get my bundle the jar threw me out against the railing and broke my teeth, and threw me backward off the car. I struck my head and it knocked me senseless. The train ran over my left leg and arm. At that time the train was a little north of Miller street; I noticed at the time we were just at Miller street. I was senseless when the wheels ran over me; I did not recollect for three or four days what had been done to me. The train checked right up running swift, did not leave much speed on at all; up to that time they seemed to be running very swift, I cannot say how fast. When I first came to consciousness I was in the city hospital; do not know what day that was; my left arm and leg were then off. I remained at the hospital for two months and was confined to the house for three or four months afterwards."

On cross-examination, the witness said: "Before the bundle fell off the seat I had ridden from Elwood station to Miller street; the jarring of the car caused the bundle to fall off the seat; when it fell off I stooped down to pick it up. The bundle fell off the end of the seat; it contained my blouse. The door opened to the east side of the car opposite me; it was opened straight with the aisle of the car; I did not look to see whether anything held it fast; I do not think the door moved; when the jar came it did not close. The iron railing was on the end of the car. When I was thrown out of the car I did not go exactly straight, I suppose I must have went from one side to the other. I struck the upper part of the railing. I was in the habit of getting off the train after it stopped at the gas house, where they changed engines, foot of Poplar street. I struck the railing on the car and was thrown backward, and fell on the ground and struck on a piece of iron, I think. I did not talk to Dr. Dean at the hospital and tell him how the accident happened; I never saw Dr.

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Dean at the hospital that I know of. I fell backward off the step on the west side of the car. I did not see any colored porter on the train."

The evidence of this witness was corroborated by that of his brother, John Coudy, as to the position occupied by plaintiff in the car, and as to the fact that one of his bundles had fallen off the seat on the floor of the car, and the fact that plaintiff, while stooping to pick it up, was, by a sudden jerk of the car, thrown through the open doorway onto the platform. While this witness stated he did not see his brother fall off the platform, he also stated that at that time his attention was attracted by people running on the street, and that when the train stopped five blocks north of Miller street he got off and went back and found plaintiff with his arm and leg crushed. This witness also stated that on the switch rail that leads into the track that the train was on, there was a mark of blood where plaintiff struck his head; and this was about a foot and a half from the main rail that the train was on. His evidence as to the train being suddenly checked is corroborated by that of one Houett, who testified that he saw the train coming up at a pretty good speed and watched it go across Miller street, and just as it crossed, the steam was shut off and the air brakes put on and the wheels stopped turning and slid along. His evidence as to his teeth being broken and his falling on the back of his head was corroborated by that of Mrs. Coning, who stated that on the day of the accident she found the back of his head injured, his lip cut and teeth broken.

It is insisted by counsel that his demurrer to this evidence ought to have been sustained, first, because it showed that plaintiff was guilty of contributory negligence, and, second, because the evidence as to the way the injury occurred was irreconcilable with the physical facts attending it. We are not willing to lay it down as a rule of law that the plaintiff, a boy of fourteen or fifteen years of age, who left his seat in the car to pick up a

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package belonging to him, which had fallen from the place where it had been deposited onto the floor of the car, was guilty of contributory negligence in so doing. Such action on his part was the result of a natural impulse to take care of his own, and contributory negligence can no more be imputed to him on that account, than if he had left his seat to procure a drink of water. While it may be customary to forbid passengers from standing on the platform of cars, no precautionary rule was shown to exist forbidding them from standing up in the cars while in motion. An ingenious and plausible argument has been made by counsel to show that the physical facts surrounding the accident are irreconcilable with plaintiff's account as to how it occurred. In view of the fact that plaintiff's account of it is positive and direct, and the fact that it is corroborated in its most important particulars by two or three witnesses, and the fact (which the demurrer to the evidence admits) that the checking of the train was so sudden as to throw plaintiff through the open door, onto the platform, and against the railing, with such force as to break his teeth and cause him to fall backward off the platform, and down the steps, we are not prepared to say that the physical facts to which we have been referred by counsel, so overcome the facts testified to as to render them untrue and impossible. Even conceding, as is contended, that as a physical fact, if plaintiff fell from the platform as he swears he did, he would have fallen beyond the reach of the rails on which the cars were running and from which he fell, it would not necessarily follow from this that plaintiff, stunned as he was by the fall, could not and did not in his struggles, come with his left leg and arm within reach of the rails on which the cars were running. Such a result was not only possible, but might well take place. The argument addressed to us on this branch of the case, might well have been addressed, as it doubtless was, to the jury whose province it was to pass upon such a question. The duty of passing upon questions of fact belongs

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to juries and that of passing upon questions of law to the courts, and the courts have no more right to invade the province of juries as to matters of fact than juries have to invade the province of courts as to matters of law.

It is further insisted that the court erred in refusing to instruct the jury after all the evidence was in that plaintiff could not recover. The evidence put in by defendant tended to show that plaintiff, instead of being injured by his being thrown from the car as detailed by him, was injured by his own recklessness in attempting to get off the cars, and was contradictory in other respects to that of plaintiff. It was for the jury and not the court to pass on the credibility of the witnesses, and to reconcile, if they could, any conflict, and determine what weight was to be given to the evidence of the respective witnesses, and for this reason under repeated rulings of this court the instruction was properly refused.

The court gave an instruction predicated the right of plaintiff to recover on the facts stated in the petition, and told the jury that if they believed from the evidence that those facts were true they would find for plaintiff, unless they further found that the checking of the train was the result of some unforeseen or unavoidable accident beyond the control of defendant's agents, and that the burden of proof was on the defendant to show such fact. It is claimed that this instruction is erroneous in that it devolves on defendant the burden of excusing the sudden checking of the train. The instruction, we think, is sustained by the authorities which hold that when an injury is shown to have been occasioned by an error of the carrier or his servants in operating the instrumentalities employed in the business of carrying, a presumption of negligence arises against the carrier, which casts on him the burden of showing that the accident happened notwithstanding the exercise on his part of the high degree of care which the law imposes upon him. *Skinner v. Railroad*, 5 Exch. 786; *Stokes v. Saltonstall*, 13 Peters 181; *Railroad Co. v. Pollard*, 22 Wall. 341;

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Farrish v. Reigle, 11 Gratt. 697; *Holbrock v. R. R. Co.*, 12 N. Y. 236; *Stockton v. Frey*, 4 Gill 406; *Fairchild v. Stage Co.*, 13 Cal. 599; *Meier v. Railroad*, 64 Pa. St. 225, 230; *Dougherty v. Mo. Pac. Ry. Co.*, 9 Mo. App. 478, which was affirmed by this court. In the case of *Scott v. Dock Co.*, 11 Jur. N. S. 1108, the rule is laid down thus: "Where the thing is shown to be in the management of defendant or his servants and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by defendant, that the accident arose from want of proper care."

The question as to whether plaintiff was or was not guilty of contributory negligence, was fairly submitted to the jury in the instructions given, and while the evidence relating to it was contradictory and conflicting, it was the province of the jury before whom the witnesses appeared, to judge of their credibility, and for that reason we do not feel at liberty to interfere with their finding, although it might seem to us to be against the weight of the evidence. Judgment affirmed, in which all concur.

MOSS V. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN
RAILWAY COMPANY, *Appellant*.

- 1. Railroads: EMBANKMENT: OBSTRUCTION OF SURFACE WATER: DAMAGES.** Where a railroad company condemns land for its right of way by proper methods, and without negligence, unskillfulness, or mismanagement, constructs its road, and the embankment therefor, obstructing no natural channel of water thereby, the injuries done by such embankment, by causing water to flow over the land of adjoining proprietors, will be regarded as the natural incidents and consequences of that which the corporation, by reason of condemning the land, had acquired the lawful right to do. For such

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injuries no action will lie, damages for them being assumed to be included in those already assessed.

2. **Railroad, RIGHT TO CHANGE ROAD BED.** The right of a railway company, after having constructed its road bed, to make such changes in it as experience may designate as proper, is, of necessity, a continuous one.

Appeal from Butler Circuit Court.—HON. R. P. OWEN,
Judge.

REVERSED.

Bennett Pike for appellant.

(1) Defendant's instruction, numbered one, at the close of the whole case, in the nature of a demurrer to the evidence, should have been given. "In the absence of any negligence, unskilfulness, or mismanagement in the construction of any embankment for the bed of a railroad over land, through which there was no natural channel for the passage of water, the injuries done by said embankment by causing the water to overflow the land of the adjoining proprietors, must be considered as the natural consequence of what the corporation had acquired a lawful right to do, by the condemnation of the land, and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed, or it was *damnum absque injuria*." *Clark's Adm'r v. Railroad*, 36 Mo. 202; *Brainard v. Clapp*, 10 Cush. 6. (2) The court erred in refusing to give instruction numbered two, asked by defendant. *McCormick v. Railroad*, 57 Mo. 438. (3) The refusal to give instruction numbered three, asked by defendant, was error. See authorities cited under first head. (4) Instruction numbered four, asked by defendant, correctly declared the rule of damages in the event of a recovery, and should have been given. Its refusal was, therefore, error. (5) The modifying of said instruction, numbered four, asked by defendant, by the court,

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and giving it, as modified, to the jury, was erroneous. *DeSteiger v. The Railway Company*, 73 Mo. 33.

C. D. Yancey for respondent.

The giving of the declarations complained of were harmless errors, from which the defendant received no injury, and affords no just cause of complaint. *Wade v. Mo. Pac. Ry.*, 78 Mo. 362. Defendant, by its answer, attempts to justify the wrong, and urges its chartered privileges. It is conceded it has the right to make any desired alteration, or improvement, on its right of way; but the maxim, "use your own property so as not to injure another," applies to railroad companies, as well as to individuals. *Illinois Central Railroad Co. v. Grabill*, 50 Ill. 341. It was the duty of the company to open ditches, or drains, through its embankment by which the water accumulated on plaintiff's land might freely pass off. R. S., sec. 810. And it had no right to so erect its trestle work, and embankment, as to overflow plaintiff's cultivated lands, and leave the water standing thereon, without means of egress, and then claim exoneration because of its chartered privileges. Its charter confers no such right. *Bradley v. Railroad*, 21 Conn. 294; *Waffle v. Railroad*, 58 Barb. 413; *Kaufman v. Griesemer*, 26 Pa. St. 407; *McCormick v. Railroad*, 57 Mo. 433. The judgment should be affirmed, with ten per cent. damages. R. S., sec. 3777.

SHERWOOD, J.—This is an action for damages instituted by plaintiff, based upon a change made in its road bed at a certain point, by substituting trestle-work in the place of an embankment, when the latter washed away in 1876, for the space of about one hundred and fifty feet in length. Damages were claimed, because, at a high stage of water in Black river, the water of that stream ran through the opening in the roadway made by the substitution of the

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trestle-work for the embankment, and there being no culvert or opening, lower down in the embankment, for the egress of the water thus running through the trestle-work opening, it so accumulated as to form a large pond on plaintiff's land, rendering about six acres of it unfit for cultivation.

Where a railroad company, as in the case at bar, condemns land by the appropriate method for that purpose, and then, without negligence, unskilfulness, or mismanagement, constructs its road and the embankment therefor, obstructing thereby no natural channel of water, the injuries done by such embankment by causing water to flow over the land of adjoining proprietors, will be regarded as but the natural incidents and consequences of that which the corporation, by reason of condemning the land, and paying the damages assessed, had acquired a lawful right to do; and for which injuries no action will lie, damages for them being assumed to be included in those already assessed. And the right of a railway company, after having constructed its road bed, to make such changes therein as experience may designate as proper, is of necessity, a continuous one; for the idea is not to be tolerated that the company, having bought and paid for a right, should be denied the fullest and freest exercise thereof. These views, in substance, have found recent expression in the decisions of this court. *Jones v. Railroad*, 84 Mo. 151; and *Abbott v. Railroad*, 83 Mo. 271. Therefore, judgment reversed. All concur.

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REYNOLDS V. THE CHICAGO & ALTON RAILROAD COMPANY, *Appellant*.

1. **Pleading: STATUTE.** A party desiring to avail himself of the provisions of a public act is only required to state the facts which bring his case clearly within it.
2. ——— : ———. In an action to recover the penalties for overcharges for transportation by a railroad company (R. S., §§ 833, 834, 835), the fact that the petition states the maximum rate to be less than that allowed by law does not vitiate it.
3. **The demurrer** to the evidence in this case held to have been properly overruled.
4. **Transportation: WEIGHT OF CARS: PRESUMPTION.** In transportation by railroads it will be presumed, in the absence of evidence to the contrary, that the cars were of regulation weight.
5. **Railroads: TRANSPORTATION: OVERCHARGES: CONTRACT.** In an action against a railroad company to recover the penalties for overcharges for transportation, where there was a special contract between the shipper and the company for legal rates, the plaintiff is not remitted to an action for breach of the contract, and such contract constitutes no defence.

Appeal from Randolph Circuit Court.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

Macfarlane & Trimble and Thos. B. Reed for appellant.

(1) The petition does not state facts sufficient to constitute a cause of action, and the motion in arrest of judgment should have been sustained. (a) It is not alleged in the petition that the act done was contrary to the provisions of any statute of the state. R. S., sec. 3550. (b) In penal actions founded upon a statute a reference to the statute is required for the purpose of in-

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forming the defendant distinctly of the nature and character of the offence. *Shaw v. Tobias*, 3 N. Y. 188. (c) In penal suits, unless a general form of declaration is expressly authorized by statute, the declaration must set forth the particular acts or omissions which constitute the cause of action, and by which the alleged penalty was incurred. 1 Chitty Pleadings, 405; *Nellis v. Railroad*, 30 N. Y. 518; *Teetshorn v. Hull*, 30 Wis. 165. (d) A reference to the statute establishing the amount of charges defendant was entitled to receive for transportation of railroad ties, and a general allegation that an overcharge was made, would probably have been sufficient, but having stated the facts without reference to the statute, plaintiff is bound by the facts stated, and there being no statute of the state imposing a penalty for doing the acts charged, no cause of action is stated. *Teetshorn v. Hull*, 30 Wis. 165. (2) Defendant's demurrer to the sufficiency of the evidence ought to have been sustained. *Chase v. Railroad*, 26 N. Y. 525. (3) The verdict of the jury was against the law and the evidence in the case. (a) Under sections 833 and 834, the defendant was entitled to charge for transportation of railroad ties for one hundred and twenty-eight miles, the admitted distance, \$22.50 per car load. Taking this as the legal rate the jury found on each of the sixteen counts the exact amount claimed. (b) Plaintiff admitted that 1100 of the ties shipped belonged to himself and two brothers jointly. The two brothers had executed a release to defendant of all claims for overcharges, if any. Where two or more have a joint personal interest the release of one bars the other, and so the jury was instructed by the circuit court. *Raddock's case*, 6 Co. 25; *Pierson v. Hooker*, 3 Johns. 68; 1 Parsons' Contracts, 163; *Buckley v. Dayton*, 14 Johns. 388; 1 Wend. 326; 20 Wend. 251. The release may be made after dissolution. 16 Johns. 137. (c) The evidence was undisputed that all ties shipped in December, 1879, and January, 1880, were

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shipped under a special contract at seventeen cents per tie, and on counts one hundred and fifty-seven to one hundred and sixty-two, both inclusive, the verdict should have been for the defendant. The jury totally disregarded the court's instructions in reference to such shipments. (d) The jury found that no car load weighed exceeding 20,000 pounds, while the weight of the evidence showed that they weighed largely in excess of that. (4) This freight, if paid, was paid voluntarily and no recovery can be had. *Ranney v. Bader*, 67 Mo. 476; *Rubey v. Shain*, 54 Mo. 207; *Railroad v. Marsh*, 12 N. Y. 311; *Hall v. Shultz*, 4 Johnson; *Nellis v. Clark*, 20 Wend. 32; *Potomac Coal Co. v. Railroad*, 38 Md. (5) The weighing of the ties was within the power of plaintiff as well as that of defendant. He could have weighed them as well before as after transportation. Failing to weigh them himself he will now be estopped to deny the weight put upon them by defendant, or will be deemed to have waived the necessity of weighing them. *Bigelow on Estoppel*, 505; *Blake v. Ins. Company*, 12 Gray 265; *Hayward v. Nat. Ins. Company*, 52 Mo. 183; *Pelkington v. Ins. Company*, 55 Mo. 173; *Russell v. Ins. Company*, 55 Mo. 585. (6) There was a special contract for the shipment of these ties at an agreed rate of \$22.50 per car load. If it were a legal rate and the contract was not kept by defendant, then plaintiff's action was for breach of contract. If the rate was illegal the contract would also be illegal, and plaintiff being a party to it will not be allowed to reap advantage from his own wrongdoing. *Hamilton v. Scull's Adm'r*, 25 Mo. 165; *Saratoga Bank v. King*, 44 N. Y. 87; *Howell v. Stewart*, 54 Mo. 404. (7) It was admitted that 20,000 pounds was a car load, and that defendant had the right to charge at the rate of \$22.50 for all ties loaded on a car in excess of 20,000 pounds was acted on by plaintiff in the trial. Plaintiff cannot now raise any question to the contrary. *Bigelow on Estoppel*, 601; *Callaway v. Johnson*, 51 Mo. 33; *Davis v. Brown*, 67 Mo. 314.

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(8) Under the pleadings and evidence in this case the action of the court in entering judgment for three times the amount of the verdict was erroneous. If the plaintiff is entitled to recover, the amount will be limited to the excess of freight charged as found by the jury.

Martin & Priest for respondent.

(1) All that was necessary was to state facts which bring the case within the provisions of the statute. *Kennayde v. Railroad*, 45 Mo. 255. (2) The demurrer to the evidence was properly overruled. When there is any evidence to sustain an issue it should be left to the jury. *Routsong v. Railroad*, 45 Mo. 236; *McFarlan v. Bellows*, 49 Mo. 311. (3) It makes no difference whether there was a contract or whether the freight was voluntarily paid. R. S., §§ 834, 835. But it was not voluntarily paid. Defendant agreed to be governed by the legal rate and then charged more than the law allowed. (4) The court properly entered judgment for treble the amount found by the jury. The jury were told in the instruction to assess the amount of overcharges if they found for the plaintiff, which they did; in other words, found that there were overcharges and the amount, and it was then the duty of the court to treble the amounts. *Wellington v. Hilderbrand*, 1 Mo. 280; *Brewster v. Link*, 28 Mo. 147. This judgment is right under the statute (Revised Statutes, *supra*), and at common law. *Chicago & Alton R. R. Co. v. People ex rel. Kansas*, 67 Ill. 11.

BLACK, J.—This was a suit in one hundred and sixty-two counts to recover penalties for overcharges for transportation of railroad cross ties from Higbee to Kansas City. There was a verdict for plaintiff on the last sixteen counts, and judgment for defendant on the others. Plaintiff, also, appealed, but as errors have not been assigned on his appeal, it will not be noticed.

1. Error is assigned in overruling defendant's motion in arrest. Section 833, Revised Statutes, determines the

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class to which this freight belongs; section 834 the maximum rate of charges; and section 835, prohibits the company from charging a higher rate, makes it a misdemeanor so to do, and gives to the aggrieved party a right of action, and allows him to recover treble the excess. Each count sets out the distance between the two points, the legal rate of charges, the amount charged, and the excess, prays judgment therefor, and that the same be trebled "according to the provisions of section 835 of the statutes of this state." The statute is a public act. It is only necessary for the plaintiff to state the facts which bring his case clearly within the law. *Kennayde v. Pacific R. R.*, 45 Mo. 258. This he has not only done, but he points out the sections by which he seeks to recover the penalty. Nor does the fact that the petition alleges the maximum rate to be \$20.50 per car, when by the law it was \$22.50, vitiate the declaration.

2. There was no error in overruling the demurrer to the evidence at the close of plaintiff's case. The plaintiff testified both on direct and cross-examination that he shipped the ninety-nine cars at \$22.50 per car; that he was charged more than that; that the amounts charged are stated in these sixteen counts, and that he paid the charges. It appears from the cross-examination that he sold the ties previous to the shipment, and they were consigned to the purchaser, who attended to and paid the freights. He did not know of his own knowledge how much the defendant received. There was no objection to any of the evidence, nor was there any motion to exclude it or any part from the consideration of the jury. We cannot say there was no evidence of the amount charged and paid. Plaintiff testified that the ties would weigh from one hundred to one hundred and ten pounds each, but there was no evidence as to how many were put upon a car. Many cars were loaded and shipped, and, until the contrary appears, we

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must presume they were of the regulation weight, *i. e.*, 20,000 pounds.

3. The plaintiff testified that these shipments in question were made under an arrangement whereby he was to pay \$22.50 per car load. The defendant asked an instruction to the effect, that if these ties were shipped under such a special contract the plaintiff could not recover, although defendant charged more than that rate, which was refused. The agreement was for legal rates. The plaintiff is not remitted to an action for breach of the contract. The statute, designed as it is to protect shippers from overcharges, cannot be defeated in this way. The special contract constituted no defence.

4. It appears that some of the shipments sued for were for ties owned by plaintiff and his brothers as partners, and that these brothers had released the company from all claims on account of overcharges. Whether the ties in question belonged to the plaintiff or the late firm, was fairly submitted to the jury. There was evidence, we think, upon which to base the instructions. We may add the shipments appear to have been by and in the name of the plaintiff. Judgment affirmed. Sherwood, J., dissents. The other judges concur.

MAXWELL V. THE HANNIBAL & ST. JOSEPH RAILROAD
COMPANY, *Appellant*.

1. **Master and Servant: INCOMPETENCY OF LATTER: DRUNKENNESS.**
Where an employe is injured by the negligent act of another servant resulting from the latter's intoxication, and the employer knew of his intemperate habits and the plaintiff did not, the employer is liable for the injury.
2. ———: ———. It is immaterial to a recovery in such case whether

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the servant causing the injury was a fellow-servant of the one injured or his superior.

3. **Instructions.** Instructions are properly refused which assume the truth of material facts, or ignore material facts, or assert inapplicable abstract propositions of law.
4. **Practice: OBJECTIONS TO EVIDENCE.** Objections to the introduction of evidence should be made at the time it is offered and not be raised by instructions to the jury.
5. **New Trial: NEWLY DISCOVERED EVIDENCE.** A party is not entitled to a new trial on the ground of newly discovered evidence when such evidence was accessible to him before the trial.

Appeal from Livingston Circuit Court.—HON. JAS. M. DAVIS, Judge.

AFFIRMED.

W. H. Russell and G. W. Easley for appellant.

(1) The relation between Walker, the foreman, and the plaintiff was that of fellow servants. *Daubert v. Pickett*, 4 Mo. App. 590; *Hamilton v. Iron Mt. Co.*, 4 Mo. App. 564; *Hofnagle v. Ry.*, 55 N. Y. 608; *Crispin v. Babbitt*, 81 N. Y. 520; *Farwell v. R. R.*, 4 Met. 49; *Rains v. R. R.*, 71 Mo. 164; *Lee v. Detroit, etc.*, 62 Mo. 416; *Cagney v. Ry.*, 69 Mo. 416; *McDermott v. Ry.*, 71 Mo. 516; Cooley on Torts, 541, 562; Wood's Master and Servant, 898, *et seq.* (2) Where the plaintiff seeks to recover on the ground that the defendant failed to exercise reasonable care in employing or in negligently retaining in its employ an incompetent servant when it knew, or by the exercise of ordinary care might have known, of such incompetency, it must be shown that such incompetency was the direct and immediate cause of the injury. Both the default of the servant and the want of ordinary care of the master in employing or retaining him must concur. *Wright v. R. R.*, 25 N. Y. 562; *Culhane v. R. R.*, 60 N. Y. 137; *Hayes v. Ry.*, 3 Cush. 270; *Laning v. Ry.*, 49 N. Y. 529; *Skip v. Ry.*, 24 L. & E. 396; s. o. 9 Exch. 223.

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Applying the foregoing principles to the case at bar the plaintiff is not entitled to recover. (3) But even if Walker did order a blow which was improper and negligent, still his negligence was not the direct and immediate cause of plaintiff's injury. Reed held the hammer and was striking the wedge and he alone could regulate the force of the blow, and if there was any negligence which was the proximate cause of the injury to plaintiff, it was that of Reed who was plaintiff's fellow servant and competent and skilful. 1 Wharton on Negligence, secs. 134, 147; Cooley on Torts, 79, 80. (4) The plaintiff cannot recover because he knew and had the same means of knowledge that the defendant did of the incompetency of his fellow servant, and with such knowledge continued to work with him. *Davis v. Detroit, etc., Railroad Co.*, 20 Mich. 105; *Indianapolis & Cin. Railroad Co. v. Love*, 10 Ind. 556; *Laning v. N. Y. Cent. Railroad Co.*, 49 N. Y. 521, 534; *Skip v. Eastern Railroad Co.*, 24 L. & E. 396; *Thayer v. St. L., Alton, etc., Railroad Co.*, 22 Ind. 29; Wood on M. & S., 804 and 805, sec. 422; 2 Thompson on Neg. 1008, sec. 15, and 1014-1017, secs. 19, 20 and 22. And see: *Dale v. St. L., etc., Railroad Co.*, 63 Mo. 455; *Devitt v. Pacific Railroad Co.*, 50 Mo. 302.

C. W. Bell, S. P. Huston and H. Lithgow for respondent.

(1) A servant in entering upon an employment assumes its ordinary risks, but the negligence of the master is not one of the ordinary risks. It is the duty of the latter to exercise ordinary care, to employ and retain none but *competent* and *careful* fellow servants. If he fail to perform such duty, it is the *master's* negligence. The master cannot delegate this duty so as to escape responsibility. His delegate, in that respect, is the master—acts in place of the master, and is aptly

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termed a *vice principal*. *Harper v. Indianapolis Railroad Co.*, 44 Mo. 488; *Harper v. Indianapolis Railroad Co.*, 47 Mo. 567; *Moss v. Pac. Railroad Co.*, 49 Mo. 167; *Marshall v. Schricker*, 63 Mo. 308; *Baulec v. Railroad Co.*, 59 N. Y. 359. (2) The evidence very clearly tended to prove that Walker was an unsafe man for his position and that Richards, defendant's vice-principal had notice of it for weeks before the injury but still retained him in the service. (3) The appellant urges that Reed mistook the degree of force intended by the words of Walker, "give it hell;" that Walker intended it as a very mild admonition, a sort of Ingersoll hell; but that Reed, being orthodox, understood it to mean an old fashioned fire and brimstone affair, and acted accordingly. This argument comes from the intimate knowledge of theology possessed by the learned gentleman representing the appellant, but as addressed to the ordinary affairs of life, it is not very convincing. We understand it to be an expression used to call forth the utmost effort. (4) The instructions given on both sides presented the case to the jury with exceptional fairness to the defendant, in fact more liberally than the decisions of this court warrant. *Porter v. Railroad*, 71 Mo. 73. The tenth instruction asked by defendant was properly refused. This instruction ignores the suddenness of the order, and the circumstances in which plaintiff was placed, the order of his boss, and required him to resolve his line of action in a moment, and act in a single instant of time, and declares as *matter of law* that failure was negligence which precluded a recovery. *Brown v. Railroad Co.*, 32 N. Y. 597; *Beiseigel v. Railroad Co.*, 34 N. Y. 622; *Gayner v. Railroad Co.*, 100 Mass. 208; *Railroad Co. v. Stone*, 17 Wall. 663; *Flynn v. Railroad Co.*, 78 Mo. 195. (5) The motion for a new trial was not well taken on the ground of newly discovered evidence. A new trial is never granted where the alleged new facts are to be proven by witnesses who testified at the trial. *Cook v. Railroad*, 56 Mo. 380.

HENRY, C. J.—This is an action for damages for personal injury. The petition alleges that plaintiff was in the employ of defendant, working in a stone quarry, and that one Walker, who was defendant's foreman, directed him to hold an iron wedge which was to be driven into a rock, and, while plaintiff was so holding the wedge, Walker ordered the person driving the wedge to strike it, in an improper, negligent and unskilful manner, with a violent and heavy blow, and that said driver struck it a heavy, violent and unusual blow, which caused the wedge to rebound, striking plaintiff in the face breaking his nose and putting out his left eye. It further alleged that Walker was incompetent, unskilful and unfit to perform the duties of foreman. That he was in the habit of becoming intoxicated, which was known to defendant long before the injuries herein complained of, or might have been known, etc., and that plaintiff did not know of his incompetency, or dissipated habits. The answer was a general denial. On a trial of the cause, the plaintiff obtained a judgment for \$3,000, from which this appeal is prosecuted.

The evidence tended to prove the facts as alleged, with reference to the manner in which plaintiff was injured. There was evidence tending to prove that Richards, who had the chief control of that work, and hired and discharged men employed in the quarry, knew some weeks before the plaintiff was injured that Walker was in the habit of getting drunk, and also, that, at the time the injury was sustained by plaintiff, he was drinking. That he kept whiskey in a hollow log or stump near the quarry, and made frequent visits to it. That when sober, he was a skilful quarryman of considerable experience. On the occasion that plaintiff was injured, it is the testimony that Walker first attempted, with a sledge hammer, to drive the wedge, but called to Reed who took the wedge, and, after making a few slight blows upon the wedge, Walker said to him, "give it

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hell," and thereupon, he struck it a violent blow, which caused it to fly out of the crevice, as alleged in the petition.

For plaintiff the court instructed the jury as follows:

"1. If the jury believe from the evidence that plaintiff was in the defendant's employ on the fourteenth day of June, 1881, and was then struck in the face and injured, and his eye put out by the rebound of a wedge used in opening rock, and that such rebound was caused by a heavy, unskilful and reckless blow given by the order and direction of one A. M. Walker, foreman or boss in the quarry; that said Walker was in defendant's employ at the time, and that he was under the influence of liquor at the time, and was thereby rendered an incompetent and unsafe man to have in charge of said work; that his habits for some time previous thereto had been intemperate, and that the defendant had notice or knowledge of such intemperate habits before the injury to plaintiff, then their finding must be for the plaintiff, unless they believe from the evidence that the plaintiff knew of the intemperate or reckless habits of said Walker, and with such knowledge continued in the defendant's employ, or that he at the time he was injured failed to use ordinary care to prevent injury, and was guilty of such negligence at the time as contributed directly to his injury."

"2. The jury are further instructed that if they believe from the evidence that James Richards was defendant's superintendent of masonry and stone work, and had power to employ and discharge Walker and the other persons employed in the quarry, and was the representative of the defendant in so doing, then notice to him or knowledge by him of the intemperate habits of Walker was notice to and knowledge by the defendant."

"3. The jury are instructed that the plaintiff is not chargeable with any negligence in failing to inquire into or investigate the habits of Walker, but was justi-

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fied in relying on defendant's duty to neither employ nor retain incompetent, intemperate or reckless bosses or foremen, after notice or knowledge thereof by defendant or its agent in the selection, hiring and discharging of hands; and although the jury should believe from the evidence that Walker was an habitual drunkard, and that his habits in that respect were generally known in Mooresville, yet that fact alone does not preclude a recovery by plaintiff, but to have that effect the jury must believe from the evidence that the plaintiff knew of such habits of Walker."

"4. If the jury find for plaintiff, they may, in estimating his damages, take into consideration all the facts and circumstances as detailed in evidence; his loss of time, his bodily and mental suffering, his expenses incurred in and about attempting to cure himself, the extent of his injuries and whether they are permanent in their nature, and allow him therefor such sum as they believe, from the evidence, he has been damaged, as shown in evidence, not exceeding \$8,000."

For defendant the following instructions were given:

"1. Unless the plaintiff has shown by a preponderance of the evidence, to the satisfaction of the jury, that A. M. Walker, foreman in the rock quarry, where the plaintiff received his injury, was incompetent to discharge his duties as such foreman, and that the defendant corporation, acting by its proper officer or agent, was negligent in employing said Walker for said position, or that if Walker was a competent foreman when employed on behalf of the defendant, that he afterward became, because of alleged intoxication, unskilful or incompetent, and that defendant knew of such incompetency, or that said Walker had been so incompetent for such a period of time before the accident to the plaintiff, that by ordinary observation and due attention, the defendant's agent, whose duty it was to discharge as well as employ quarrymen and foremen in such work, should have known that Walker had become incompetent, and

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that the plaintiff did not know that Walker was so incompetent by reason of intoxication, and that by the exercise of ordinary care and caution plaintiff could not have known of such incompetency, then the jury must make their verdict for the defendant."

"2. The court further instructs the jury that there is no evidence that the said A. M. Walker, foreman in the quarry, was unskilful or incompetent in any respect to discharge the duties required of him, except when in a state of intoxication."

"3. If the jury shall believe from the evidence that the accident to the plaintiff was caused by the breaking of the wedge which was being held by the plaintiff; and the piece of said wedge so broken off rebounding or flying back and striking the plaintiff on his face and thus injuring him, then the plaintiff cannot recover in this action, and the verdict must be for the defendant."

"4. The court further instructs the jury, that although Walker, the foreman at the quarry, may have been negligent in directing that the wedge which was being held by the plaintiff be struck a heavy or violent blow, yet if it further appear from the evidence that said Walker was, and theretofore had been, a skilful and competent person in the discharge of such duties, then such single act or instance of negligence will not render the defendant liable in this action."

"5. That the fact that said Walker ordered said Reed to strike said wedge a violent blow, and that by reason of said violent blow being struck said wedge flew out and injured plaintiff, is no reason why plaintiff can or ought to recover, unless the jury are satisfied, by a preponderance of the evidence, that such a rebound of said wedge would be so likely to follow said blow that a reasonably prudent man ought to have known that such might have been the result, and unless they do so find, by a preponderance of the evidence, plaintiff cannot recover; and in making up their opinions in relation

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thereto, the jury will consider the condition of the stone, and all the other facts in evidence at the time the blow was struck."

"6. The court instructs the jury that even though the said Walker may have been a common drunkard or an incompetent foreman, still the jury cannot find for the plaintiff in this case unless they are satisfied by a preponderance of the evidence that plaintiff was injured by reason of such incompetency and not by accident."

"7. The court instructs the jury that if they find from the evidence that the injury was occasioned to the plaintiff in consequence of the intoxication of Walker, the foreman, and that the plaintiff knew of his intoxication at the time of the injury, or that by the use of ordinary observation, he could have known that said foreman was incapacitated from a proper discharge of his duties, then they will find for the defendant, notwithstanding they may find that James Richards, the agent of the company, may have known of his habits of intoxication."

"8. The court instructs the jury, that they should entirely exclude from their consideration all evidence in regard to the alleged intoxication of said Walker after the plaintiff received his injury."

"9. The court instructs the jury, unless they find from the preponderance of evidence that the injury to the plaintiff was the result of negligence upon the part of Walker, foreman in charge of the work, and that said negligence was occasioned by the intoxication of said foreman, and that the defendant's officers knew, or agents had notice that said foreman was so habituated to the use of intoxicating liquors as to render him an unsafe and unfit person to have in charge of such work, and that the plaintiff was ignorant of such habits and incompetency of said foreman, they will find for the defendant."

The following instructions asked by defendant were refused:

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"10. The court instructs the jury that, notwithstanding they may find that the said Walker ordered the party to strike the wedge in a violent manner, and that the same was carelessness upon the part of said Walker, yet if they find from the evidence that the plaintiff heard said order, then the jury are instructed that it was negligence on the part of the plaintiff to retain his hold on said wedge until the blow was made; and if they believe from the evidence that he had time from the moment he heard said order until the blow was struck to let go of the wedge, then it was negligence on his part, and the jury must find for the defendant."

"11. The court instructs the jury that if they find from the evidence that Walker was the foreman in charge of the work at the time of the injury, and that he was in the employ of the defendant in connection with the plaintiff, and that James Richards was the general superintendent of the work, and that Walker and plaintiff were under his charge as such, then in that event the said Walker and plaintiff were fellow servants, and the verdict must be for the defendant."

"12. The court instructs the jury that they must be satisfied by a preponderance of the evidence that at the time defendant hired said Walker, they knew that he was an incompetent and unsafe foreman to place in charge of said work, or that since said Walker was so employed by said company, said company had been duly advised that said Walker was, at the time of the hiring, or had since become incompetent, and still retained him, and that if the jury should find that they did so, still the jury are instructed that if the plaintiff had the same means of information as to said Walker's incompetency, and still continued to labor under said Walker, then plaintiff cannot recover in this action, even though he did not know it in fact."

"13. The court instructs the jury that they will exclude from the jury the evidence of Moore as to the

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statements of Richards, made before the injury, in regard to the habits of Walker for intemperance."

The allegation in the petition is, that Walker was incompetent and defendant knew it, and plaintiff did not. This issue was fairly submitted to the jury by plaintiff's first instruction, and also in the first, given at defendant's instance. We see no objection to any of the instructions given, either for plaintiff, or defendant, but think that they fairly submitted the issues made to the jury, and shall, therefore, consider the instructions asked by defendant, which the court refused.

The tenth was erroneous, because it assumes that if the order to strike the wedge, given by Walker, was an improper one, plaintiff knew it. The eleventh was erroneous, in declaring that if the jury found that plaintiff and Walker were fellow servants, their verdict should be for defendant, ignoring all the facts which tended to establish a liability on the part of defendant, even conceding that Walker and plaintiff were fellow servants. The twelfth refused was properly refused, because, while it asserts correctly an abstract proposition of law, yet it is inapplicable here. The evidence was direct that Richards was informed of the intemperate habits of Walker, and this was knowledge on the part of the company, and there is no evidence that plaintiff had the same means of information of his habits, that defendant had. Besides, in defendant's ninth instruction given, the jury were told that if Walker's negligence was occasioned by intoxication, and that plaintiff knew of his intoxication, at the time of the injury, or that, by the use of ordinary observation, he could have known that he was incapacitated for a proper discharge of his duties, they should find for defendant, although they should find that Richards, the agent of the company, knew of his habits. There was no error in refusing defendant's thirteenth instruction, asking the court to exclude from the consideration of the jury the testimony with respect to statements of Richards, before the

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plaintiff was injured, to the effect that he knew of Walker's intemperate habits. Whether Moore's testimony was admissible or not, if objection had been made to it by defendant, the instruction was properly refused. The testimony was elicited by direct questions and was not, as is sometimes the case, given in such a manner that the defendant had no opportunity to object beforehand. Defendant not only interposed no objection, but cross-examined the witness at length, in relation to the same matter. To allow a party to permit, without objection, the admission of evidence, and for the first time make his objection in instructions would be intolerable practice. If he had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him and when it turns out otherwise raise his objection, but must be held to have waived it.

Nor is there anything in the affidavits with respect to newly discovered evidence which would warrant us in disturbing the judgment. Two of the affiants were witnesses, and testified at the trial, and all of them were in the service of the company. The newly discovered evidence related to the effect of a violent blow upon the wedge and the intemperate habits of Walker, and to statements made by plaintiff exonerating the company from blame. The drunkenness of Walker, and the effect of a violent blow upon the wedge were directly in issue, and the knowledge of the intemperate habits of Walker, possessed by Richards, was also in issue, and he testified in the cause. If the defendant did not know that these witnesses, experienced quarrymen, knew what the effect of a violent blow upon the wedge would be, it was because it was negligent in the preparation of the case, and all the alleged newly discovered facts were so accessible to the defendant, that negligence must be imputed to it in not discovering them before the trial.

The judgment is affirmed. All concur, except Sherwood, J., who dissents.

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GREER *et al.* v. PARKER, *Appellant*.

1. **Practice: INSTRUCTIONS.** An instruction, which is misleading or which ignores the only real matter in issue under the pleadings, is properly refused.
2. —: **ABSENCE OF CO-COUNSEL: DISCRETION OF TRIAL COURT.** Where the evidence in a case is taken on the seventeenth and a continuance granted to the twenty-first, at the request of defendant's counsel, at which time the trial is concluded, this court will not interfere with the action of the trial court in overruling the motion for a new trial based upon the ground of the unavoidable absence of one of defendant's counsel, when it appears that his senior counsel was present and able and competent to and did conduct the case.

Appeal from Johnson Circuit Court.—HON. N. M. GIVAN,
Judge.

AFFIRMED.

S. P. Sparks and Smith & Krauthoff for appellant.

(1) Plaintiffs' first instruction is erroneous. It did not correspond with the issues joined. *Iron Mt. Bank v. Dickson*, 62 Mo. 70; *Capital Bank v. Armstrong*, 62 Mo. 59; *Bruce v. Sims*, 34 Mo. 246. The second instruction for plaintiffs was erroneous in stating that the burden of proof shifted to defendant when the jury were convinced by a preponderance of evidence of a certain state of facts. The burden is on defendant only, when it is necessary to plead an affirmative defence. 1 Greenleaf's Ev., sec. 64. Plaintiffs' third instruction was erroneous in assuming that there was proof of a request to pay after the date of Parker's visit to St. Louis, October 4, 1881; if there had been such proof it was error to single it out and tell the jury if they so found the verdict should be for plaintiffs. *Kæning v. Life Association*, 3 Mo. App. 596; *Gerren v. Railroad*, 60 Mo.

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405. The fourth instruction was also erroneous. It is error to use the words *preponderance of evidence* in an instruction. *Clark v. Kitchen*, 52 Mo. 316. (2) Defendant's sixth instruction correctly stated a controlling principle of law in the case. Defendant was not liable for any payments made on account of these contracts by Billingsley & Nanson without a precedent request or a subsequent agreement to repay, for it appeared from the evidence that their only connection with the contracts was in the capacity of brokers, and that the alleged payments of Greer to them were for losses they had sustained after they had closed out the contracts. *Saladin v. Mitchell*, 45 Ill. 79; 1 Pars. on Con. 98; *Thompson v. McCullough*, 31 Mo. 224; *Lapsley v. McKinsty*, 38 Mo. 245. (3) The agreement of R. L. Greer to answer for the debt, default or miscarriage of Parker not being in writing was within the statute of frauds (R. S., sec. 2513), and not binding on him, and his act in suffering his money in hands of Billingsley & Nanson to be applied by them to this purpose was voluntary and cannot be the foundation of an action against Parker, the maxim *volenti non fit injuria* applies. *Hollinsbee v. Ritcher*, 49 Ind. 261; Baylies on Surety & Guar., 350; *Pitt v. Passord*, 8 Mees. & W. 530; *Davis v. Humphrey*, 6 Mees. & W. 143; *Lucas v. Jeff. Ins. Co.*, 6 Cow. 635; *Frith v. Sprague*, 14 Mass. 455; *Hatch v. Pegram*, 21 La. Ann. 722; *Randolph v. Randolph*, 2 Rand. 490. (4) The failure of Philips to arrive at the hour appointed for resuming the further hearing of the case, was an unforeseen disappointment in a reasonable expectation, against which ordinary prudence, would not have afforded protection, without any element of negligence; and was such *surprise* as would justify the interference of this court. *Fretwell v. Lafoon*, 77 Mo. 26; *Peers v. Davis*, 29 Mo. 184. A distinction is to be made between the surprise necessary to furnish ground of new trial, and that which is to *delay* trial. The court was asked to delay the trial a few hours,

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which could not have prejudiced the plaintiffs. Hillard on New Trials, 425 (1886); *Williams v. Weatherby*, 1 N. H. 18. The *surprise* was clearly established and the consequences could have been avoided by laying the case over a few hours. Defendant nor his attorneys were guilty of any *laches*. They applied for relief at the time, and the consequences could have been avoided on another trial; in such cases courts of last resort will interfere. *Delmas v. Martin*, 39 Cal. 555; *Patterson v. Ely*, 19 Cal. 28. Courts of last resort will not permit an opposite party to perpetuate a fraud through the negligence of an attorney. *Spaulding v. Meir*, 40 Mo. 176; *State v. Lavis*, 11 Mo. 438. This court ordered a new trial where an attorney had been surprised by misconstruction of decision of this court as to admissibility of secondary evidence. *Boyce v. Mooney*, 40 Mo. 104. Where a witness absented himself after subpoena on him, a new trial must be granted on payment of costs. *Ruggles v. Hall*, 14 John. 112. The statute guarantees to every party to a civil action the right to defend in person or by attorney. R. S., sec. 3564. In the administration of justice, counsel are as much a part of the court as the judge who presides over the proceedings. The duties of the bench and bar differ in kind, not in purpose. The argument of a case is as much a part of the trial as the hearing of evidence. *Brown v. Swinford*, 44 Wis. 282; *Wynn v. Lee*, 5 Ga. 237; *Meredith v. People*, 84 Ill. 480.

O. L. Houts and John J. Cockrell for respondents.

Plaintiffs' first instruction was correct. The facts sustain it and it corresponds with the petition. If there was a variance between the petition and the evidence, the proper course to take advantage of it was not pursued. *Briggs v. Munchon*, 56 Mo. 467; *Ely v. Porter*, 58 Mo. 158; *Wells v. Sharp*, 57 Mo. 56; *Bennett v. McCanse*, 65 Mo. 194. Plaintiffs' second instruction was correct. The burden of proof always rests on the party

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undertaking to prove any fact. Whar. on Ev., sec. 357, p. 307; *Nichols v. Winfrey*, 79 Mo. 550. For the same reasons plaintiffs' fourth instruction is correct. Where defendant confesses and avoids the burden is on him. *St. Louis Tow Co. v. Orphans' Ins. Co.*, 52 Mo. 529. The words, "preponderance of evidence," as used in plaintiffs' instructions, are proper. *Gay v. Southworth*, 113 Mass. 333; Sackett on Instructions, 39, 89, 114, 126, 184, 213, 318; 1 Wharton on Evidence, sec. 357, p. 306; *Huchberger v. Ins. Co.*, 5 Bissell 106; *Hanken v. Squeres*, 5 Bissell 186; *Fullerton v. Bank*, 1 Pet. (U. S.) 616. The sixth instruction asked by defendant was properly refused. It is contradictory in itself and does not make good sense. Defendant did not object to plaintiffs' instructions at the time of the trial. Unless objections are made and exceptions saved at the time, this court will not review them. *Wells v. Zalle*, 59 Mo. 509; *Walsh v. Allen*, 50 Mo. 181; *Koegel v. Givens*, 79 Mo. 77; *Shaw v. Potter*, 50 Mo. 281; *Van-Cleve v. Gilstrap*, 50 Mo. 412; *Mattingly v. Moranville*, 11 Mo. 604; *Devlin v. Clark*, 31 Mo. 22; *Calvert v. Alexander*, 33 Mo. 149; *Case v. Fogg*, 46 Mo. 44. There is no ground for reversal, because of the absence of one of defendant's counsel. He was represented by competent counsel, the same who appears in this court. The granting of continuances is a matter wholly within the discretion of the trial court. This is particularly true as applied to the action of the court in refusing to wait for absent counsel. *Jacob v. McLean*, 24 Mo. 40; *Gheike v. Jod*, 59 Mo. 42.

NORTON, J.—This a suit to recover from defendant the sum of \$2,340, alleged to have been paid on the fourth of October, 1881, by plaintiffs, at the request of and for the use of defendant, to Billingsley & Nanson, a firm doing business in the city of St. Louis. The answer denies this allegation. On the trial, plaintiffs had

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judgment for the sum claimed, with interest, from which defendant has appealed.

No objections were made nor exceptions saved to the reception or rejection of evidence, nor were any exceptions saved to the action of the court in giving and refusing instructions, except to its action in refusing the sixth instruction asked by defendant, which is as follows:

“The court instructs the jury that defendant, Parker, was not liable on the contracts of purchase read in evidence for any loss Billingsley & Nanson may have sustained thereon, unless he agreed to and with them to become liable therefor, and if the jury find that the sum of money mentioned in the petition was paid by plaintiffs to Billingsley & Nanson to indemnify them for any loss they may have sustained by virtue of said contracts after such loss had occurred, you will find for defendant, unless you find and believe from the evidence that defendant, Parker, requested Billingsley & Nanson to pay same or agreed to and with them to become liable therefor.”

This instruction was properly refused, first, because it was misleading in referring to a liability arising on contracts of purchase read in evidence when the record, in point of fact, does not show that any contracts were read in evidence; and, second, it entirely ignores the question as to whether plaintiffs paid money to Billingsley & Nanson at defendant's request and for his use, which was the only real matter in issue under the pleadings.

It appears from the record that the introduction of evidence was concluded on Saturday evening, the seventeenth of February, 1883, and the cause was then, at the request of defendant's counsel, and by consent of plaintiffs, postponed to Wednesday morning, February 21, on which day at ten o'clock the jury came, and the cause coming on to be heard on argument, S. P. Sparks, one of defendant's attorneys, asked that the argument be postponed till the next day, because of the absence of John F. Philips, his co-counsel, to whom had been intrusted the management of the case, including the drawing of

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instructions, argument to the jury, etc. ; that said Philips had by misadventure failed to make railroad connections and could not reach the place of trial before nine o'clock that night ; that said Sparks was thus surprised, and caught unprepared either to argue the case, or then draw instructions. Plaintiffs objected to any further postponement and proposed to submit the case without argument, which proposition defendant declined, and thereupon the court directed that the cause be proceeded with, whereupon instructions both on behalf of plaintiffs and defendant were presented, all of which were given, except the sixth instruction asked by defendant, and hereinbefore referred to. The cause was then argued and submitted to the jury. In the motion for new trial the above facts are set out as a ground for setting aside the verdict and granting a new trial. In support of the motion, affidavits of Sparks and Philips were filed, to the effect that Philips, to whom it had been agreed between defendant and his counsel, that the drafting of instructions and argument of the case to the jury should be confided, had by unavoidable accident been prevented from being present on Wednesday, the day to which the cause had been laid over from the preceding Saturday, at request of defendant and by consent of plaintiffs, to enable said Philips to attend the Daviess county circuit court, at Gallatin ; that in consequence of such absence Sparks was unprepared to proceed with the cause.

Counter affidavits were filed by Mr. Cockrell and Mr. Houts, plaintiffs' attorneys, to the effect that defendant was represented in the trial of the cause by Sparks, Comingo, and Philips, and that, while they were desirous when the evidence closed that the cause should proceed regularly, they did, for the accommodation of defendant, consent to its postponement till Wednesday ; that they had no knowledge of an agreement between the counsel of defendant and defendant that the preparation of the instructions and argument of the cause

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was confided solely to Philips; that Sparks was the senior counsel for defendant in the case, had filed the answer, and attended at the taking of depositions, examined the witnesses, etc., and that Philips made his first appearance in the case when called for trial; that after the evidence closed, Sparks told one of plaintiffs' counsel that he had prepared instructions and given them to his co-counsel; that they proposed to defendant's counsel to submit the case to the jury without argument which they declined, and insisted upon arguing it; that it was argued by Mr. Sparks for defendant for one hour, the same time allowed to plaintiff's counsel; that on Wednesday, after the usual time for the trial had passed, the court, at the request of defendant's counsel, gave them further and ample time to prepare instructions, and after argument by counsel for plaintiff to the jury, the court permitted defendant's counsel to prepare and submit other and additional instructions.

There is nothing whatever in the affidavits above alluded to tending to show that defendant, by reason of the failure of Philips to reach the place of trial on Wednesday for the purpose of presenting instructions, and arguing the case, was left before the court without an attorney fully competent to prepare instructions and argue the cause. It is true, Mr. Sparks states that Philips had been relied on by himself and his client to do these things, and that in consequence of his absence he was taken by surprise, and was unprepared then to present instructions or argue the case, but the court gave him time to prepare instructions, and, also, further indulged him, after plaintiff's counsel had argued the case to the jury, to prepare and present other instructions. It also appears that defendant's counsel not only refused to submit the case to the jury without argument, as proposed by counsel for plaintiffs, but insisted upon the argument. If the facts disclosed in the affidavits had shown or tended strongly to show that by the unavoid-

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able accident which prevented Philips from being present, that the defendant had been left without any counsel at all, or with counsel incompetent and unfit to present his case either to the court or jury, the case might then be controlled by the principle announced in the cases to which we have been cited, that a party has a right to be heard by himself and counsel.

The trial judge who heard the argument, did not feel authorized, nor do we feel authorized on the facts before us without having heard it, to say that Sparks, who was the senior counsel in the case, had prepared and filed the answer, attended the taking of depositions, thus familiarizing himself with the facts, was incompetent either to present the law of the case to the court or the facts of the case to the jury, but, on the contrary, from the brief on file by him in this court, we are justified in drawing the inference that he was entirely competent to perform either of these duties. For reasons similar to those given in the case of *Jacob v. McLean*, 24 Mo. 40, we are unwilling to say that the trial judge erred in overruling the motion for new trial.

Judgment affirmed, in which all concur.

TUCKER ET AL. V. BARTLE, *Plaintiff in Error*.

1. **Contract:** SPECIFIC PERFORMANCE OF: CONSIDERATION. Plaintiff was indebted to defendant in the sum of \$1,900, and after agreeing upon the price of cattle sometime before that sold and delivered by plaintiff to defendant, and crediting it on the debt, defendant said if plaintiff would pay him what was due him, he, defendant, would make plaintiff a quit-claim deed for the land involved in suit. *Held*, there was no consideration for the promise to make the conveyance and a suit to enforce it could not be maintained.
2. **Statute of Frauds.** The statute of frauds does not make an agreement in writing obligatory because it is in writing. If not

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binding as a verbal agreement before the statute because of want of consideration, reducing it to writing imparts to it no validity. The statute simply declares that no action shall be brought upon certain contracts unless reduced to writing.

Error to Moniteau Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED.

Smith & Harrison, G. J. Davis and A. W. Anthony
for plaintiffs in error.

(1) The court erred in permitting the plaintiffs to introduce any evidence in favor of the devisee, Tucker. The petition should have been first surrendered setting forth his interest. Story's Eq. Pl. (8 Ed.) secs. 379, 354; R. S., sec. 3867. (2) The alleged contract was *nudum pactum*, and therefore void, for the reason that the defendant promised to make a conveyance, in consideration that Jones would pay his own pre-existing debt. A promise by A to do what he is already bound to do to B, is not a sufficient consideration to support a promise by B to do something in return to A. In other words a promise cannot be conditioned on a promise to do a thing to which the party is already fully bound. *Price v. Cannon*, 3 Mo. Rep. 453; *Willis v. Gammill*, 67 Mo. 730; *Jackson v. Cabbin*, 8 M. & W. 790; *Bayley v. Homan*, 3 Bing. N. C. 915; *Dixon v. Adams*, Cro. Eliz. 538. (3) The cumulative promise of Jones to pay the debt which he already owed, a legal obligation to pay already existing, was a nullity. *McManus v. Bk.*, L. R., 5 Ex. 65; *Deacon v. Gridley*, 15 C. B. 295; *Malleau v. Hodgson*, 16 Q. B. 689; *Robb v. Mann*, 11 Pa. St. 300; *Gilmore v. Green*, 14 Bush. 772. (4) The alleged contract, even if in writing, would not be specifically enforced because the subject matter would be too indefinite. Pomeroy on Contracts, secs. 152, 153, 161; *Praler v. Miller*, 3 Hawkes 628; *Fowler v. Redican*, 52 Ill. 405; *Carr v. Duval*, 14

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Peters 77. An executory contract for the purchase of land will not be specifically enforced where the contract is denied in the answer and the evidence shows that it rested entirely in parol. *Wildbahn v. Robedaux*, 11 Mo. 659; *Hook v. Turner*, 22 Mo. 333; *Sutton v. Shipp*, 65 Mo. 297; Story's Eq. Jur., sec. 753. (5) In order to have the court to interpose to compel a conveyance there must be a definite specific agreement to sell and purchase proved. It must have been followed by acts of the parties, which in their nature, form a part performance of such an agreement, and a failure to perform works a fraud upon the party who seeks performance. 3 Washb. on R. P. (4 Ed.) top page 235; *Hagar v. Hagar*, 71 Mo. 610; *Johnson v. McGrunder*, 15 Mo. 365; *Despain v. Carter*, 21 Mo. 331; *Young v. Montgomery*, 28 Mo. 604. (6) Under the pleadings and facts developed at the trial, it was an abuse of discretion in the circuit court to refuse the defendant leave to file an amended answer setting up the statute of frauds.

Draffen & Williams for defendants in error.

(1) There was no error in the action of the trial court in the substitution of Thomas Tucker as a party plaintiff upon the record as the devisee and successor of Thomas S. Jones, whose death had been suggested. (2) The court did not err in refusing permission to defendant to file an amended answer. Amendments are not permitted where a party is guilty of *laches*. R. S., sec. 3586; *Weed, etc., v. Philbrick*, 70 Mo. 646; *Simmons v. Carrier*, 68 Mo. 416; *Stewart v. Glenn*, 58 Mo. 481. (3) The statute of frauds is not a bar to the relief sought by plaintiffs. *Leibka v. Knapp*, 79 Mo. 22; *Edwards v. Smith*, 63 Mo. 119; 1 Greenleaf Ev., sec. 295; 3 Parsons on Contracts (5 Ed.) 4; Agnew on Statute of Frauds, 245; Fry on Specific Performance, sec. 360; *Gale v. Nixon*, 6 Cowen 448; *Waterman on Specific Performance*, sec. 231; *Heidemann v. Woifstein*, 12 Mo. App.

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366; *Bean v. Valle*, 2 Mo. 103; *Moore v. Mountcastle*, 61 Mo. 424; *Beckwith v. Talbot*, 95 U. S. 289; *Ivory v. Murphy*, 36 Mo. 534. (4) The consideration was amply sufficient to uphold the agreement. This was not a resale to Jones of property for which Bartle had paid a valuable consideration, and should not be so treated. *Waterman on Specific Performance*, 687; *Williams v. Jensea*, 75 Mo. 681. A compromise of doubtful rights will be upheld and carried into effect. *Stephens v. Spiers*, 25 Mo. 386; *Craus v. Hunter*, 28 N. Y. 389; *Pitkin v. Noyes*, 2 Am. Rep. 218.

HENRY, C. J.—The object of this suit is to enforce the specific performance of an alleged contract by which defendant agreed to convey to Thomas Jones and wife a tract of land in Morgan county, upon which Jones resided. In February, 1875, Jones and wife, reserving to themselves and the survivor a life estate in said land, conveyed it by deed to Bartle, “in consideration (as the deed expresses it) of valuable service rendered and to be rendered by him to them, and the sum of one dollar paid by him to them.” The petition alleges that the defendant procured plaintiffs to make the deed; that it was made to secure moneys advanced and to be advanced to Jones by Bartle, and that afterwards, learning that Bartle claimed to own the land subject to the life estate of plaintiffs, Jones demanded that Bartle should execute a deed releasing any interest he might claim in said land; Jones insisting that he and his wife understood their deed as intended to secure Bartle in such advancements as he had made, and should thereafter make; that the parties met and it was agreed between them that Jones should deliver to Bartle a certain lot of cattle owned by Jones and pay him eight hundred and eighty-seven dollars in cash, the balance, which would remain unpaid, of an indebtedness of Jones to Bartle, and that thereupon the contract in relation to the land should be rescinded. That this agreement was made in October, 1879, and that

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Jones then delivered the cattle to Bartle and afterwards tendered to him said balance of eight hundred and eighty-seven dollars, and demanded a deed from Bartle, which was refused. After the institution of this suit Jones died, leaving a last will and testament, by which he devised to Thomas Tucker the land in controversy, and he was afterward substituted as plaintiff.

The defendant in his answer denied the agreement alleged, and also that the consideration for the deed made by Jones and wife was that named in the petition, and also that it was made to secure any indebtedness of Jones to Bartle then, or to be contracted. On a hearing, the court rendered a decree as prayed for, and defendant has appealed.

It appears from the evidence that Jones and his wife were old and childless, and that for a number of years prior to the execution of the deed by them to Bartle, he and they were on the most intimate terms, each having a high regard and warm affection for the other. That Bartle had, for many years, been in the habit of advancing large sums of money to Jones, to be used by the latter in his business of buying and selling cattle, and Bartle charged him no interest for its use. That Bartle lived in St. Louis and was engaged in the same business extensively, and handled the stock purchased by Jones in Morgan and adjoining counties, and sold it for him, or when a better market could be found elsewhere, shipped it to that market and gave Jones the benefit of reduced freight rates he had secured for himself on account of the large shipments he was in the habit of making, and for all this he made no charge against Jones. There is abundant evidence proving that Jones not only repeatedly told Bartle, but others, that in return for the many and valuable favors extended to him by Bartle, he intended that, at the death of himself and wife, Bartle should have all his property. There is no allegation in the petition that Bartle by unfair means procured the execution of the deed, and no proof of the allegation made

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that he procured it at all; on the contrary all the evidence tends to show that it was voluntarily executed by Jones and wife in accomplishment of a purpose long entertained by them and frequently expressed, not only to Bartle, but to others.

After Jones executed the deed in St. Louis, he took it with him to his home in Morgan county, and kept it there until Bartle made him a visit, which was of frequent occurrence, when his wife signed the deed, and it was afterwards filed for record by Jones. This deed was twice read to Mrs. Jones before she signed it, and that she and Jones both well understood its nature and effect is manifest from the evidence. She testified that she knew that the life estate of herself and husband was reserved to them, and that they had the right to live on the farm and use it as long as they lived. In August, 1879, Jones wrote to Bartle, saying: "I would like to see you while we are alive in this world. You will find everything for you on the farm. Six or eight dollars will pay all I owe here."

It was stipulated in the deed that in the event of a sale of the premises by the parties before the death of the grantors, that they should receive all the interest accruing upon the proceeds during their joint lives, in place of the rents and profits of the land. In 1877 Bartle had met with considerable pecuniary losses in his business and wrote to Jones requesting him not to draw on him; but Jones did draw on him for \$1,800, and Bartle wrote to him that he was not prepared to pay it, and requested Jones to take care of the draft. Shortly after this correspondence Jones and Bartle met and agreed that the land should be sold. Bartle found a purchaser at a price that was satisfactory, but when Jones learned, as he ought to have known, that Bartle and wife would have to join in a deed to the purchaser, he refused to sell. Here, for the first time, arose a misunderstanding between the parties. Bartle was informed that Jones and wife and some of their friends were impeaching his conduct to-

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ward the old people, and accusing him of crookedness in the land transaction, and he went to Versailles, as he says, to vindicate his character. He and Mr. and Mrs. Jones, Judge Ross and other common friends, met in the back room of a bank at Versailles, when Bartle and Jones and wife talked of their affairs. But little, if anything, was said with regard to the consideration for, or motives which prompted Jones and wife to execute the deed. They wanted the land back, but the disagreement was about the cattle. No property passed and the cattle had been sold and delivered to Bartle some time before, and nothing remained but to agree upon the price, which was finally fixed at three and one-half cents per pound, and this credited upon an amount which Jones agreed that he owed Bartle, left Jones in Bartle's debt about eight hundred dollars. After some conversation between Bartle and Mrs. Jones, in which both became a little excited, he said: "Pay me what you owe me and I'll make you a quit-claim deed to the land." This is the contract of which the court was asked to decree a specific performance, and the above are substantially the facts proved.

Defendant did not plead the statute of frauds and plaintiffs' counsel, therefore, insist that that defence was thereby waived, but was there any contract proved enforceable in a court of equity, even if it had been in writing? Jones was indebted to Bartle in the sum of \$1,900, and after agreeing upon the price of cattle some time before that sold and delivered by Jones to Bartle, and crediting it on the debt, Bartle said if they would pay him what they owed him he would make them a quit-claim deed to the land. There was no consideration for his promise. It was gratuitous. *Willis v. Grammill*, 67 Mo. 730; Chitty on Contracts (11 Ed.) 60. The statute of frauds does not make an agreement in writing obligatory because it is in writing. If not binding on a verbal agreement before the statute, because of a lack of consideration, reducing it to writing imparts to it no validity. The statute simply declares that no action shall be

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brought upon certain contracts unless reduced to writing. We fail to find in the voluminous evidence in this case any agreement in writing, or any agreement which, if reduced to writing and signed by the party to be charged, would entitle plaintiffs to its specific performance.

It is contended that the dispute concerning the land culminated in the agreement on the part of Bartle to convey, as a compromise. If there was any controversy as to the land on the day the parties met at Versailles, this record does not disclose it. Mr. Jones, it is true, made a peremptory demand upon Bartle to convey it. Judge Ross in his testimony, states that, "at the conference at the bank no settlement was made. Bartle stated the amount of money Jones owed him, and Jones did not dispute it. The disagreement was about the cattle. No property passed. That they finally agreed upon a price at which Bartle took the cattle, and Bartle promised to make a quit-claim deed to Jones and wife on payment of the balance due him." This was the ascertained balance after crediting Bartle's demand against Jones with the price of the cattle, and his promise to make a quit-claim deed to Jones and wife had no consideration to support it, except the payment of this balance due him. There was no controversy then or elsewhere as to the interest Bartle acquired in the land, or as to that reserved by Jones and wife. The only complaint Jones and wife ever made, except in the petition, was that Bartle wanted to receive the proceeds of the sale of the land. They always admitted his right as a remainderman, and no question as to the respective interests of the parties under the deed was discussed in their interview at Versailles.

It is alleged in the petition that the deed was made to secure advancements of money already made, and subsequently to be made, but there is no evidence to sustain the allegation, and it is not alleged that Bartle ever refused to make an advancement within his alleged obligation. It is nowhere claimed that his

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refusal to honor Jones' \$1,800 draft was a breach of any obligation he owed to Jones. If the deed was made to secure money already advanced, is it not strange that having gone to a conveyancer to make a deed conveying to Bartle a fee-simple title to the land, he should have changed his mind and reserved a life estate to himself and wife without consulting Bartle, and is it not equally strange, if it was only security for money lent, that when informed of the nature of the deed executed, Bartle acquiesced without a word? The trouble between these old friends commenced a little before their meeting at Versailles. Tucker, the substituted plaintiff, it seems, was an old acquaintance of the Joneses, and soon after the meeting of Bartle and Jones at Versailles, he appears upon the stage advancing money to enable Jones to pay Bartle and get a deed, and then at the old man's death a will is produced by which the old man left Tucker the property he had acquired through the aid which Bartle had given him.

Judge Ross says in his testimony, that after the failure of the negotiations for the sale of the land, he talked with Jones and wife about the cause of dissatisfaction, and that he "came to the conclusion that some one was meddling in it that did not know what was best for the old folks." I think that any one carefully reading the testimony will come to the same conclusion. Tucker is the party who is to receive the chief, in fact, nearly all the benefit from a decree enforcing a specific performance of this alleged agreement. Mrs. Jones gets just what was reserved for her in the deed to Bartle, and should the decree stand, Bartle gets the balance due him from Jones, and nothing whatever for the valuable services he had rendered to Jones, which enabled the latter to accumulate the property in dispute, and for which Jones promised to remunerate him by leaving him his property at the death of himself and his wife.

The judgment is reversed and cause dismissed. All concur.

Brown v. The Mo. Pac. Ry. Co.

BROWN V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

Justice's Court : JUDGMENT BY DEFAULT : MOTION TO SET ASIDE : APPEAL BOND : SURETIES, JUDGMENT AGAINST. Where an appeal is taken from a judgment by default before a justice, without the party aggrieved having, within ten days from the rendition of the judgment, moved to set the same aside, it is properly dismissed, on motion, in the circuit court. R. S., sec. 3040. The justice, in such case, having no power to grant the appeal, the appeal bond is void, so far as the sureties are concerned, and the circuit court cannot enter judgment against them, but can only dismiss the appeal and enter judgment for costs against the appellant.

Appeal from Cass Circuit Court.—HON. N. M. GIVAN,
Judge.

AFFIRMED.

Robert Adams and George N. Bowles for appellant.

(1) The court erred in dismissing the appeal, and rendering judgment against defendant for costs. R. S., sec. 3039. The affidavit for appeal, filed by defendant, contains every requirement of the statute, and was within ten days after judgment. R. S., sec. 3044. The motion to dismiss only urged that no affidavit for appeal had been filed. No reason, not specified in the motion, shall be urged in its support. (2) The complaint states no cause of action. The only averments are that defendant was the owner of a railroad. That the plaintiff was the owner of a fine brood sow of the value of twenty-five dollars. That the sow strayed upon the railroad without fault of the plaintiff, where said railroad was not fenced, and where there was no public crossing. It is not averred that at the point where the hog entered upon the road the defendant was required to erect a fence, or that the killing was occasioned by the failure

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to fence. *Morrow v. M. P. Ry. Co.*, 82 Mo. 169; *Cecil v. Railroad*, 65 Mo. 249; *Davis v. Railway*, 65 Mo. 44; *Johnson v. Railway*, 76 Mo. 453.

Foster P. Wright for respondent.

The appeal was improperly allowed, as defendant did not move to set the judgment by default aside, as required by Revised Statutes, section 3040. Even the appeal bond was void. The only jurisdiction which the circuit court had, was to dismiss the appeal. *Smith v. Railroad Co.*, 53 Mo. 388; *Kinser v. Shands*, 52 Mo. 326; *Garnett v. Rogers*, 52 Mo. 145. The allowance of the appeal by the justice raises no presumption that an application had been previously made to set the judgment by default aside. *Burns' adm'r v. Hunton*, 24 Mo. 337. The statement is sufficient. *Belcher v. Railroad Co.*, 75 Mo. 514.

EWING, C.—This was a suit before a justice of the peace to recover damages of defendant for the alleged killing of a brood sow. There was judgment by default before the justice, the defendant failing to appear before said court. There was afterwards an application for an appeal to the circuit court, which was granted, but before which there was no motion or application before the justice to set aside the default.

This is the only question necessary to be noticed as it is decisive of the case. Revised Statutes, 1879, section 3040, provides that: "But no appeal shall be taken from a judgment by default, or non-suit, unless within ten days after the rendering of such judgment, application shall have been made to the justice by the party aggrieved, to set the same aside, and such application shall have been refused." In this case no such application was made, and the motion to dismiss the appeal was properly sustained. But the judgment of the circuit court against the sureties on the appeal bond, was erroneous. The justice having no power to grant the appeal, the appeal

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bond was void, as far as the sureties are concerned, and the circuit court, therefore, could not enter judgment against them. The only valid judgment the circuit court could enter was simply a dismissal of the appeal, with judgment for costs against the defendant, and just so far its judgment is affirmed. *Smith v. Railroad Co.*, 53 Mo. 338, is a case precisely similar to this. *Kinser v. Shands*, 52 Mo. 326; *Garnett v. Rodgers*, 52 Mo. 145; *Laughlin v. January*, 59 Mo. 383. All concur, except Henry, C. J., absent.

PORTH *et al.*, by *Guardian*, v. GILBERT, *Appellant*.

1. **Practice in Supreme Court: PRESUMPTION.** In the absence of evidence in the record to the contrary, it will be presumed that the acts and rulings of the trial court were correct.
2. ——— : ——— : **INSTRUCTIONS: NEW TRIAL.** It is no ground for a new trial that the instructions given by the court had been lost after trial. Where the instructions are not contained in the record, it will be presumed that the action of the trial court in giving them was not erroneous.

Appeal from Osage Circuit Court.—HON. A. J. SEAY,
Judge.

AFFIRMED.

Hamillon & Fisher and *N. C. Kouns* for appellant.

The verdict was not sustained by the evidence. It is well settled that plaintiffs must show title in themselves before they can question defendant's possession. "In ejectment plaintiff must stand on his own title. If he has none he cannot recover against party holding pos-

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session." *Large v. Fisher*, 49 Mo. 307; *Foster et al. v. Evans*, 5 Mo. 39. It was error for plaintiffs' attorney to read to the jury the United States patent for the land in controversy, contrary to the rulings of the court. *State v. Lee*, 56 Mo. 165; *Ayler v. Thompson*, 1 Allen 453. If the same case that was tried below cannot be heard in the Supreme Court, because of the loss of papers, appellant is entitled to a reversal of the judgment.

Edwin Silver for respondents.

(1) Revised Statutes, section 2241, have no applicability to this case. Plaintiffs, having failed to recover on their paper title, could still do so "upon the ground of adverse possession for ten years, or upon proof of prior possession under claim of right." *Hunt v. Railroad Co.*, 77 Mo. 252, and cases cited. "There is no doubt that a pure possession alone will entitle a party to recover in ejectment where the plaintiff connects himself with that possession." *Matney v. Graham*, 59 Mo. 192. Where the bill of exceptions does not preserve the evidence, the court will not disturb the finding, on the ground that it is unsupported by the evidence. *Johnson v. Long*, 72 Mo. 210. (2) Appellant has failed to point out wherein respondents' attorney was guilty of misconduct in his argument to the jury. The trial court had all of the facts before it, and was the most competent tribunal to pass upon this question. When a party seeks the reversal of a judgment it is incumbent on him to show, not merely error of the trial court, but material or reversible error. R. S., sec. 3775; *Hoskinson v. Adkins*, 77 Mo. 537. (3) The cause should not be reversed because of the loss of the instructions. *Birney v. Sharp*, 78 Mo. 74.

DEARMOND, C.—This was an action of ejectment. The bill of exceptions recites that "the plaintiffs intro-

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duced documentary evidence tending to prove the allegations of the petition, and the same being held by the court to be insufficient to establish a legal title, plaintiffs offered verbal evidence tending to prove possession, and defendant offered evidence tending to prove the allegations of the answer." Plaintiffs had the verdict and judgment, and defendant appealed. In a supplemental motion, supported by affidavits, a new trial was asked, because plaintiffs' counsel, in the absence of defendant's counsel, and during a temporary absence of the judge, read in his argument to the jury a certain deed, "in spite of the rulings of the court, both on instructions and evidence," and because the instructions given by the court had been lost and could not be copied into a bill of exceptions "if a new trial should be denied."

I. We cannot learn from the record whether or not plaintiffs' counsel went out of the record in his argument to the jury, as defendant asserted, nor can we form an opinion as to the probable or possible effects of the abuse, if any. With nothing upon which to rest a judgment of our own we must indulge the usual presumption and accept as correct the judgment of the trial court.

II. *Birney v. Sharp*, 78 Mo. 73, disposes of the other point in the case. There the instructions appear to have been lost after the motion for a new trial had been overruled; here the fact of their loss is urged as affording a reason for sustaining the motion. But the principle is the same; the instructions are not in the record, and we, therefore, presume that as to them the action of the court below was not erroneous. *State v. Jefferson*, 77 Mo. 139. It would seem that in this case the loss might, with ease and propriety, have been supplied. But it was not, and the mere fact of the loss is no ground for a reversal of the judgment appealed from, which should be affirmed. All concur, except Henry, C. J., absent.

Drew v. Arnold.

DREW V. ARNOLD *et al.*, *Plaintiffs in Error.*

1. **Deed, ACKNOWLEDGMENT OF BY WIFE: EVIDENCE: CROSS-EXAMINATION.** Where a married woman testifies that she was not made acquainted with the contents of a deed by the notary taking her acknowledgment to it, it is competent to ask her on cross-examination, whether or not she knew the contents at the time she made the acknowledgment, and informed the notary, in answer to his inquiry to that effect, that she was acquainted with the contents.
2. ———: **CERTIFICATE OF OFFICER.** Where it appears to the court, or officer taking the acknowledgment of a married woman to a deed, that she is acquainted with its contents, and that they are familiarly known to her, he would be justified in certifying that she was made acquainted with the contents, and the design of the law would be accomplished, although the officer imparted no information to her.
3. ———: **EVIDENCE.** Where a married woman testifies to what occurred before the notary who took her acknowledgment to a deed, it is competent to cross-examine her as to all that occurred in reference to the matter.

Error to Washington Circuit Court.—HON. J. L. THOMAS, Judge.

AFFIRMED.

Dinning & Byrns for plaintiffs in error.

The court below erred in allowing plaintiff to introduce evidence tending to prove that Mrs. Arnold knew the contents of the deed of trust in controversy, by means other than information furnished by the officer taking the acknowledgment. *Wannell v. Kem*, 57 Mo. 478; *Sharp v. McPike et al.*, 62 Mo. 300; *Goff v. Roberts*, 72 Mo. 570; *Whitely v. Steward*, 63 Mo. 360; *Wannell v. Kem*, 51 Mo. 150; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 78 Mo. 537; R. S., secs. 680, 681. (2) The court erred in refusing the two instructions asked by defendants. They were in harmony

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with the authorities cited above. (3) The court erred in giving an instruction of its own motion in conflict with the authorities cited under the first head.

Samuel B. Parton for defendant in error.

(1) The court below committed no error in allowing Mrs. Arnold to be cross-examined as to her knowledge of the contents of the deed of trust at the time she made her acknowledgment. The statute regulating the taking of acknowledgments of married women, was substantially complied with in this case. *Chauvin v. Wagner*, 18 Mo. 531; *Belo v. Mayes*, 79 Mo. 76. (2) The instructions given embodied the law of the case. (3) The trustee in the deed of trust having removed from the state, the acting sheriff, by the terms of the deed, was authorized to sell the land. (4) The testimony of Mrs. Arnold, one of the defendants, established the fact that she executed the deed, that she was aware of what she was doing, and the fact that she received none of the money should not defeat the plaintiff's action of ejectment, she being in possession of the premises.

NORTON, J.—This suit is by ejectment to recover the possession of certain land in Washington county, in the petition described. Plaintiff had judgment, from which the defendants have prosecuted a writ of error to this court. Plaintiff, in support of his title, put in evidence a deed of trust executed by defendant, Arnold, and his wife, conveying the land in question to secure a certain debt therein mentioned. On default being made in the payment of this debt, the land was sold under the deed, plaintiff becoming the purchaser and obtaining a deed, which he also put in evidence. The land conveyed in the deed of trust belonged to the wife. The deed was acknowledged by both husband and wife before a notary public, whose certificate, attached thereto, is in strict

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compliance with the statute. The defendants sought, on the trial, to defeat plaintiff's recovery on his paper title, on the ground that Mrs. Arnold, the wife, at the time the deed was acknowledged, was neither made acquainted with the contents of the deed, nor examined separately and apart from her husband, as to whether she executed it freely and voluntarily, and without undue influence of her husband. She was introduced as a witness, and testified that she was not made acquainted, by the notary, with the contents, and that her husband was in the room at the time she was examined by the notary, with his back to her, writing at his desk, but near enough to hear what was said. On her cross-examination she was asked: "Did you know the contents of the deed of trust at the time you acknowledged the same?" She answered that she did. She was then asked if the notary did not ask her at the time if she was acquainted with the contents of the deed, to which she replied that he did.

The notary who took the acknowledgment was then called by plaintiff as a witness, and testified that Mrs. Arnold's husband was not in the room at the time the acknowledgment was taken, and was not present when the privy examination took place; that he told Mrs. Arnold that the instrument was a deed of trust on the land in question, and asked her if she was acquainted with its contents, to which she replied that she was. He further stated that his certificate was true. The defendant objected to the question propounded to Mrs. Arnold, on her cross-examination, which objection was overruled, and it is for this action of the court we are asked to reverse the judgment, and the case of *Wannell v. Kem et al.*, 57 Mo. 478, is relied upon to bring about that result.

In the case of *Thomas v. Meier*, 18 Mo. 573, it was held expressly that a certificate of acknowledgment of a married woman, which states that "she acknowledged

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and declared she was well acquainted with the contents of the deed, is sufficient, although it does not state that the contents were made known to her by the officer." When this case was decided the statutes of 1825, then in force, required that the court, or officer, before whom the acknowledgment was made, "shall make her acquainted with, and explain to her, the contents of such deed, or conveyance." The statute in force at the time the acknowledgment in question was taken, did not require the officer taking the acknowledgment, as did the act of 1825, to "explain the contents of the deed," but only to make her "acquainted with the contents," and if under the act of 1825, the requirement of the statute that the officer taking the acknowledgment of a married woman "shall make her acquainted with, and explain to her, the contents" of a deed, is met and complied with by a statement in the certificate that "she acknowledged and declared that she was well acquainted with its contents," it logically follows that under the statute in force at the time, the acknowledgment in question was taken, which only required the officer to make her acquainted with its contents, would likewise be met and complied with had the certificate stated that Mrs. Arnold acknowledged and declared that she was well acquainted with the contents of the deed acknowledged by her. In *Chauvin v. Wagner*, 18 Mo. 531, it was said that the certificate says that Mrs. Chauvin was "made acquainted" with the contents of the deed. "Acquainted" means "familiarily known," and when it appeared to the court, or officer taking the acknowledgment, from the statements of the married woman, that she was acquainted with the contents of the deed, that they were familiarily known to her, he would be justified in certifying that she was made acquainted with the contents and "the design of the law would be accomplished, although the officer imparted to her no information." That it would be a question of consistency, whether the officer could certify that he made her

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acquainted with the contents of the deed, or explained the contents to her when she knew them perfectly before she came before him.

The very object of the questions propounded to Mrs. Arnold and objected to by defendant, was to show that when the deed was presented to her for signature and acknowledgment, that she was acquainted with its contents and so declared to the officer taking the acknowledgment, and under the authority of the above cases the objections were properly overruled. Besides this, the witness had detailed in her examination in chief what occurred before the notary who took her acknowledgment, and on general principles the plaintiff, on her cross-examination, had the right to have her state all that occurred in reference to the matter in dispute, and we can see no reason why this right should be restricted in this case, but on the contrary, in view of the fact that these certificates are liable to be assailed long after the acknowledgment has been taken, after titles have passed from one to another and after the officers taking them have died, we think that the fullest latitude in the cross-examination of the impeaching and interested witnesses should be allowed. In the language of Judge Scott, in the case of *Chauvin v. Wagner*, who concurred with Judge Gamble in reference to the sufficiency of the statement in the certificate that Mrs. Chauvin was made acquainted with the contents of the deed: "Justice and true policy both demand an enlarged and liberal construction of the certificates to the deeds of married women, especially as courts lend a willing ear to all complaints of obtaining conveyances from married women by undue means."

It may be said of the case of *Wannell v. Kem*, which is relied on by defendants, that the explanation of the contents of the deed must be on a privy examination, it is overruled in the case of *Belo v. Mayes*, 79 Mo. 67, and in so far as it militates against the admissibility of the

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evidence sought to be elicited by the question propounded to Mrs. Arnold in this case, it is irreconcilable with the cases of *Chauvin v. Wagner* and *Thomas v. Meier*, 18 Mo. 531 and 573, above referred to, and believing the doctrine announced in the two cases last cited to be more consonant with sound principle than that annouced in that of *Wannell v. Kem*, we must hold that the court did not err in receiving the evidence objected to. It may be added in this connection that by the laws of 1883, page twenty, the officer taking the acknowledgment of a married woman is not required as formerly to state in his certificate that he either made her acquainted with the contents of the deed, or that she was examined apart from her husband.

The instruction given by the court to the effect, "that if the court, sitting as a jury, believe from the evidence that the notary at the time he took the acknowledgment of Mrs. Arnold, examined her separate and apart from her husband, and on such examination informed her what property was described in the deed of trust, and that she acknowledged to him that she was acquainted with the contents of the deed, and executed the same freely and without compulsion or undue influence of her husband, and that at the time she executed the deed she knew and understood its effect, the finding should be for plaintiff," covered the facts in evidence and also embraced the law applicable to them and was properly given.

Judgment affirmed. All concur. Henry, C. J., absent.

The State v. Wilson.

THE STATE V. WILSON, *Appellant*.

1. **Grand Juror, Discharge of:** PLEA IN ABATEMENT. It is competent for the court to discharge a grand juror who had qualified but failed to attend, and order a new grand juror to be summoned and substituted for him. R. S., sec. 2787. Such action constitutes no ground for a plea in abatement.
2. **Change of Venue:** DISCRETION OF TRIAL COURT. Where the court hears evidence for and against an application for a change of venue in a criminal case, based upon the ground of the prejudice of the inhabitants of the county against the defendant, its action upon the application is final, unless it is shown that it abused its discretion.
3. **Practice, Criminal:** CONTINUANCE. It is not error to deny an application for continuance where it shows the exercise of no diligence on the part of defendant in preparing for trial.
4. ———: ———. An application for continuance, based upon the ground of the absence of material witnesses, which fails to comply with the requirements of the statute (R. S., sec. 1884), by setting forth the probability of procuring the testimony of such witnesses and the time within which it may be done, is defective and properly denied.
5. ———: ———: DISCRETION OF COURT. Granting and refusing applications for continuance are matters always resting largely in the discretion of the trial court, and unless it clearly appears that such discretion has been unsoundly exercised the Supreme Court will not interfere.
6. ———: JUROR, QUALIFICATION OF. One who has formed or expressed an opinion of the guilt or innocence of the accused from rumor or newspaper reports, is not thereby disqualified from serving as a juror on the trial of the cause. Distinguishing *State v. Culler*, 82 Mo. 623.
7. ———: ———. One who has formed an opinion from rumor and newspaper reports, and who said on his *voir dire* that he "would naturally suppose defendant guilty," does not thereby give evidence of bias or prejudice against defendant, and is not disqualified for that reason to sit as a juror in the trial of the cause.
8. ———: MURDER: INSTRUCTIONS FOR LOWER GRADE OF HOMICIDE. In a prosecution for murder, where the instructions given on behalf of defendant, based upon his own testimony, allow a finding for a grade of homicide less than murder, it is reversible error to fail to

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define such lower grade of crime of which defendant might, under the evidence, be convicted.

9. **Criminal Law: THREATS: RES GESTAE.** While mere threats are not sufficient to palliate a homicide, yet when they occur as a part of the *res gestae*, and are uttered while making an attempt on the life of the person threatened, they may be worthy of consideration, as tending, in connection with such attempt, to lower the grade of homicide when perpetrated by the person threatened.
10. ———: **RECITALS IN MOTION: JUDICIAL NOTICE.** In a case of conviction of a negro, where the motion for new trial recites that there were no negroes returned on the panel of forty, from which the jury was selected to try the cause, but there is nothing in the record to show whether the panel was white or black, or whether the population of the county consists in part of negroes, such recitals do not constitute evidence of these facts, and the Supreme Court will not take judicial notice of them, and will not review the point.

Appeal from Lafayette Criminal Court.—HON. J. E. RYLAND, Judge.

REVERSED.

R. A. Hicklin, A. J. Hall and Wm. Young for appellant.

(1) The court erred in refusing to grant defendant's application for a change of venue. It abused its discretion. (2) The court erred in sustaining the demurrer to defendant's plea in abatement. The grand jury must be considered as a whole. The *status* of any one member fixes the *status* of the whole grand jury. If any one of them be open to exception, he vitiates the whole grand jury. *Barney v. State*, 12 S. & M. 68; *State v. Duncan*, 7 Yerger 271; *State v. Jacobs*, 6 Texas 99. (3) The court erred in overruling defendant's application for a continuance. (4) The court erred in overruling defendant's challenges to certain jurors. They had formed and expressed opinions of defendant's guilt or innocence which it would take evidence to remove. The juror, George Vandiver, said he naturally supposed defendant guilty. It is for the Supreme Court to say whether such jurors

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are biased or prejudiced. *Baldwin v. State*, 12 Mo. 223. (5) The court erred in giving the third instruction for the state. It virtually told the jury that if they could satisfactorily and reasonably infer the elements of murder in the first degree from the evidence they should do so. A rational and substantial doubt of defendant's guilt requires his acquittal. *State v. Fugate*, 27 Mo. 535. (6) There was no evidence upon which to base the fifth instruction on the part of the state. (7) The eighth and ninth instructions given for the state were comments on the evidence and erroneous. 53 Mo. 257. (8) The panel of forty returned by the sheriff was not impartially selected. Defendant was a negro. One-sixth of the population of the county is negroes and there should have been negroes on the panel. Const. of U. S., amendment 13. (9) The court erred in not giving an instruction defining murder in the second degree. *State v. Banks*, 73 Mo. 592; *State v. Matthews*, 20 Mo. 55; *State v. Stonum*, 62 Mo. 596.

•B. G. Boone, Attorney General, and John S. Blackwell, prosecuting attorney, for the state.

(1) The criminal court did not err in refusing to grant defendant's application for a change of venue. R. S., sec. 1859; *State v. Whitton*, 68 Mo. 91; *State v. Sayers*, 58 Mo. 585, and cases cited; *State v. O'Rourke*, 55 Mo. 440. (2) The court did not err in sustaining the demurrer to defendant's plea in abatement. R. S., secs. 1771, 1772, 1773, 1846, 2778, 2787; *State v. Connell*, 49 Mo. 282; *State v. Bleekley*, 18 Mo. 428; *State v. Welsh*, 33 Mo. 33; *State v. Baker*, 20 Mo. 338; *State v. Breen*, 59 Mo. 413; *State v. Knight*, 61 Mo. 373; *State v. Hart*, 66 Mo. 208; *State v. Drogmond*, 55 Mo. 87. (3) The criminal court did not err in overruling defendant's application for a continuance. (a) Because the application is insufficient. It fails to show due diligence on defendant's part in getting ready for trial. The probability of

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procuring the testimony of the alleged absent witnesses at some future time is not even mentioned in said application. R. S., sec. 1884. (b) The statements in the application are in direct conflict with the record in the case. (c) If the witness had been present at the trial his testimony, as stated in the application, would have been irrelevant, incompetent and immaterial. *State v. Alexander*, 66 Mo. 148; *State v. Martin*, 74 Mo. 547. (d) The application was addressed to the sound discretion of the trial court, and this court will not interfere unless such discretion appears to have been exercised unsoundly or oppressively. *State v. Green*, 13 Mo. 383; *State v. Lange*, 59 Mo. 418; *State v. Williams*, 69 Mo. 110; *State v. Sims*, 68 Mo. 305; *State v. Ward*, 74 Mo. 253, and cases cited; *State v. Fox*, 79 Mo. 109. (4) The court did not err in overruling defendant's challenges to certain jurors. They were not disqualified under the statute and decisions of this court. R. S., sec. 1897; *State v. Stein*, 79 Mo. 330; *State v. Walton*, 74 Mo. 274, and cases cited; *Baldwin v. State*, 12 Mo. 223; *State v. Core*, 70 Mo. 491; *State v. Barton*, 71 Mo. 288; *Reynolds v. U. S.*, 98 U. S. 145; *Curby v. Com.*, 84 Pa. St. —; *Meyers v. Com.*, 79 Pa. St. 151; *Barbo v. People*, 80 N. Y. 484; *Guetrys v. State*, 66 Ind. 94; *State v. Lawson*, 38 Iowa 51; 94 Ill. 299; 9 Fla. 215; *People v. Welch*, 49 Cal. 174; *Ogle v. State*, 33 Miss. 383; *Carson v. State*, 50 Ala. 134; *Thomas v. State*, 36 Texas, —. This case does not come within the doctrine of the *State v. Culler*, 82 Mo. 623. (5) The instructions on the part of the state, taken all together, fairly present the case to the jury, and defendant cannot reasonably complain. *State v. Kilgore*, 70 Mo. 546; *State v. Talbott*, 73 Mo. 348; *State v. Holme*, 54 Mo. 153; *State v. Lane*, 64 Mo. 319; *State v. Thomas*, 78 Mo. 327; *State v. Linney*, 52 Mo. 40; R. S., sec. 1918; *State v. Cooper*, 7 Mo. 436. (6) It is too late after verdict to object for the first time to the constitution of the trial jury. R. S., secs. 2777, 2778; *Samuels v. State*, 3 Mo.

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69; *State v. Marshall*, 36 Mo. 400; *State v. Jones*, 61 Mo. 232; *State v. Ward*, 74 Mo. 253; *State v. Breen*, 59 Mo. 413; *State v. Pitts*, 58 Mo. 556. (7) There was no evidence upon which to base an instruction for murder in the second degree. Defendant is guilty of murder in the first degree or guilty of no offence. *State v. Harris*, 59 Mo. 550; *State v. Kotovsky*, 74 Mo. 247; *State v. Ward*, 74 Mo. 253; *State v. Starr*, 38 Mo. 270; *State v. Jones*, 79 Mo. 441; *State v. Snell*, 78 Mo. 240; *State v. Kilgore*, 70 Mo. 546.

SHERWOOD, J.—The defendant, a negro, was indicted for killing a girl of his own race, by shooting her to death with a pistol. The crime of which defendant stands convicted, if testimony to that effect from all the witnesses except defendant, be taken as true, and the nature, number and direction of the gun-shot wounds be considered, was an atrociously brutal murder, without palliation or excuse. The testimony of the defendant, in some particulars, tended to show circumstances extenuating the offence; but when his whole testimony is examined, no possible doubt can arise as to the existence of his guilt in the degree affirmed by the verdict of the jury. And this fact becomes very conspicuous when his testimony as to the circumstances attending the killing is contrasted with the physical facts of the direction of one of the gun-shot wounds, the blood stains on the bed where the deceased was lying when the defendant went into the room, and the testimony of Dr. Russell as to the recumbent position deceased was in when receiving that wound. Numerous errors have been assigned for the reversal of the judgment.

I. There was no error in holding the plea in abatement, filed by defendant, insufficient. Taking that plea, it having been demurred to, as true, the facts thus admitted constitute no ground for a plea in abatement. Section 2787, Revised Statutes, 1879, is directly applicable to this case. That section expressly provides that,

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"in case of non-attendance of any grand juror after he shall have been qualified, or in case any grand juror is excused by the court from further service for any cause, the court shall cause another grand juror to be summoned and sworn." The grand juror who had been qualified having failed to attend, it was perfectly competent for the court to discharge him and to order a new grand juror to be summoned and substituted for him.

II. Regarding the application for a change of venue, it was based upon the ground of the prejudice of the inhabitants of the county against the defendant. On this point witnesses were heard *pro* and *con*, and the decision of the trial court was final thereon, unless some abuse of judicial discretion were shown, which has not been done. *State v. Whitton*, 68 Mo. 91, and cases cited; Revised Statutes, 1879, section 1859.

III. The application for a continuance was properly denied, and this for several reasons: The indictment was found on the fourteenth day of October, 1884; the defendant was arraigned on the sixteenth day of October, when he appeared in person and by counsel; on the twentieth day of October additional counsel were appointed for him; on the twenty-third day of October, the day the trial began, the application for a continuance was made, wherein it is alleged that defendant was not able to procure counsel for his defence until the twentieth day of October, when the same were appointed for him by the court; that on the eighteenth day of October an attorney of the court, at defendant's solicitation, had a subpoena issued for his witnesses, which subpoena as to the absent witness on the twenty-second day of October was returned *non est*. Some of these statements are contradicted, as already seen by the record, and, besides, show no diligence. The defendant had counsel on the sixteenth day of October, when he was arraigned and a jury ordered for the trial of the cause, for this is shown by the record, and yet no subpoena was issued for two days thereafter, as appears by defendant's sworn statement.

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Why this delay? The witness, Chapman, as the application states, resides in Lexington, and that he had gone for the time being to St. Louis. When he went to that place is not stated. From aught that appears, if timely process had been issued, he would have been served prior to his departure for St. Louis. Furthermore, the application is defective, in that it does not comply with the statute by setting forth the probability of procuring the testimony of the witness and within what time. Revised Statutes, 1879, section 1884. Moreover, granting and refusing applications of that character, always rests largely in the discretion of the court, and unless it clearly appear that such discretion has been unsoundly exercised this court will not interfere, as has been often decided, as shown by authorities cited for the state.

IV. Complaint is made that error occurred in disallowing defendant's challenges to certain jurors. The opinions which those jurors had formed or expressed were based on rumors and newspaper reports, and, therefore, this case is unlike that of *The State v. Culler*, 82 Mo. 623, where the jurors held incompetent had either read the evidence as taken down by the coroner or else had read it when published in full in the newspapers. George V. Vandiver, one of the jurors, on his *voir dire*, after stating that his opinion was formed, as aforesaid, said he "*would naturally suppose defendant guilty.*" Much stress is laid by defendant's counsel on this response of Vandiver. By it he evidently only intended to convey the idea that after having read about the homicide in the newspapers and heard people talk about it, that such a supposition would very naturally enter his mind, and it would certainly be singular if it would not. Suppositions, conjectures, inferences, and surmises are constantly being mirrored in the human mind by reason of statements or impressions made by others, and it is just as natural that this should be the case as it is that the retina of the human eye should reflect the images of surrounding objects. Instead, therefore, of this response

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indicating bias or prejudice on Vandiver's part, it rather was indicative of an out-spoken ingenuousness that had nothing to conceal. Who is there that, surrounded with rumors and newspaper reports that an outrageous murder had been committed and the culprit arrested and put in jail, would not "naturally suppose the defendant guilty?" The human mind would have to undergo a very radical change when such surroundings would not produce similar impressions.

V. Respecting the instructions, they are, for the most part, correct, and sustained by the evidence. But there is a serious lack in the instructions, in that, while those given on behalf of the defendant, and evidently based on his testimony, recognize and allow a finding for a grade of homicide less than murder in the first degree, yet no definition of any lower grade of crime is given. This is sufficient ground for reversal, and as the case goes back it may not be amiss to remark that the eighth instruction is probably calculated to mislead the jury. While mere threats are not sufficient to palliate a homicide, yet when they occur as a part of the *res gestae* and are uttered while making an attempt on the life of the person threatened, they may be worthy of consideration, as tending, in connection with such attempts, to lower the grade of homicide when perpetrated by the person threatened.

VI. Relative to the point that no negroes were returned on the panel of forty from which the jury was selected to try this cause, it is enough to say that there is nothing in the record to show whether the panel was white or black, or whether the population of Lafayette county consists in part of negroes, since there is no proof of these matters in the record, and the recital of them in the motion for a new trial constitutes no evidence of them, and judicial notice of such things cannot be entertained by this court.

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The result is, the judgment must be reversed and the cause remanded. All concur, except Norton, J., who dissents. Henry, C. J., concurs in the result.

WOODWARD, *Plaintiff in Error*, v. THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY.

Corporations: MALICIOUS PROSECUTION: FALSE IMPRISONMENT. A corporation is liable to an action for false imprisonment, or for malicious prosecution instituted by its authority. Affirming *Boogher v. Life Association of America*, 75 Mo. 319.

Error to Phelps Circuit Court.

REVERSED.

L. F. Parker for plaintiff in error.

The court below sustained the demurrer on the authority of *Gillett v. Mo. Valley R. R. Co.*, 55 Mo. 315, which was then recognized as authority in this state. That case was overruled by this court in the case of *Boogher v. The Life Association of America*, 75 Mo. 319, in accordance with which authority and the cases there cited, this case should be reversed and remanded.

John O' Day for defendant in error.

EWING, C.—This was an action for malicious prosecution. There was a demurrer to the petition upon the ground that it does not state a cause of action. That the defendant, being a railroad corporation, cannot be held for a malicious prosecution, or false imprisonment. The demurrer was sustained, and the plaintiff brings the case here for review on writ of error.

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The court below erred in sustaining the demurrer, and its judgment must be reversed. This court has decided to the contrary in *Boogher v. The Life Association of America*, 75 Mo. 319, in a well considered opinion overruling the case of *Gillett v. Missouri Valley Railroad Company*, 55 Mo. 315. It is, therefore, useless to elaborate this case. The judgment of the circuit court is, therefore, reversed and the cause remanded. All concur, except Henry, C. J., absent.

THE STATE V. KELLY, *Appellant*.

1. **Criminal Law : PRACTICE : INSTRUCTIONS.** Upon appeal from a conviction of murder in the second degree an error in an instruction for murder in the first degree is immaterial, and such instruction will not be reviewed by the Supreme Court.
2. ———: **INSTRUCTIONS.** It is not error to refuse an instruction embodied in others given.

Appeal from Crawford Circuit Court.—HON. V. B. HILL, Judge.

AFFIRMED.

J. R. Webb and M. G. Clark for appellant.

D. H. McIntyre, Attorney General, for the state.

NORTON, J.—The defendant was indicted in the circuit court of Crawford county at its March term, 1880, for murder in the first degree for killing his wife, Sarah Kelly, on the 14th day of September, 1877. He was put upon his trial at the September term, 1880, and was convicted of murder in the second degree, and his punishment assessed at thirty-one years imprisonment in the

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penitentiary. He has appealed to this court, and assigns for error the action of the court in giving and refusing instructions.

The instructions given on behalf of the state were all excepted to, but no specific objections to them have been pointed out, and we may say of them that all that were given find support in various decisions of this court, except so much of the eighth instruction which defines deliberation to mean, in a cool state of the blood, but inasmuch as defendant was only convicted of murder in the second degree, this error was immaterial under the ruling of this court in the case of *State v. Fritterer*, 65 Mo. 422. All the instructions asked by the defendant were given except the second, which was to the effect that unless the blows inflicted on the deceased were given for the purpose, and with the intention of taking the life of the deceased, the jury could not find defendant guilty of murder in either degree. Conceding for the purposes of this case that this instruction contained a correct declaration of law, its refusal may be justified on the ground that the instructions given for the state told the jury that an intention to kill was a necessary element to be found before defendant could be convicted of murder in either degree, and on the further ground that the court, in the first instruction given on behalf of defendant, told the jury that if they believed defendant inflicted the blows upon the head of Sarah Kelly with a stick which was a dangerous weapon, and that such blows caused her death, and that they were inflicted while the defendant was in a heat of passion, without a design to effect death, that they could not find defendant guilty of a greater offence than manslaughter in the third degree.

The evidence tended to show that defendant, without any provocation, on Friday evening, September 14, 1877, knocked his wife, the deceased, down with his fist, dragged her by her hair on the floor, and then, with a stick about two feet long, struck her on the head and various parts of the body; that the next morning about

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ten o'clock, she became speechless, and died on the following Monday night from inflammation or concussion of the brain, superinduced by the blows on her head. Defendant, though present when she died, did not attend her burial, and thereafter fled the country.

We find nothing in the record to justify us in disturbing the judgment, and, therefore, affirm it. All concur, except Henry, C. J., absent.

THE STATE V. FREDERICKS AND REED, *Appellants*.

1. **Criminal Law : EVIDENCE : CONFESSIONS.** A confession procured by artifice is not for that reason inadmissible, unless the artifice used was calculated to produce an untrue confession.
2. ——— : ——— : ———. Mere suggestions or advice to the accused to confess, or even solemn adjurations to do so by one holding no official position, will not render the confession inadmissible. But in all cases the age, experience and constitution of the person making the confession and the circumstances under which it was made should be taken into consideration in determining the question of its admissibility.
3. ——— : ——— : **DECLARATIONS OF CONSPIRATOR.** After the accomplishment or abandonment of the common enterprise, no declaration of one conspirator will affect another and should be excluded as to the latter.
4. ——— : **WITHDRAWING EVIDENCE BY INSTRUCTION.** Where a specific objection to improper evidence is overruled and it goes to the jury with the sanction of the court, the error will not be cured by withdrawing it by instruction, if it is of such character as to prejudice defendant's case.
5. ——— : **PRINCIPAL AND ACCESSORY : STATUTE.** All distinction between principal and accessory before the fact has been abolished by Revised Statutes, section 1649.

Appeal from Cass Circuit Court.—HON. N. M. GIVAN,
Judge.

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REVERSED.

Wooldridge & Daniel for appellants.'

(1) The court erred in admitting the confessions of defendant, Reed. It does not appear that they were voluntarily made. Those made to witness, Wirt, were induced by promises and by means of intimidation employed by the witness. *State v. Brockman*, 46 Mo. 566, 569; *State v. Simon*, 50 Mo. 370, 372; *State v. Hagan*, 54 Mo. 195; *State v. Jones*, 54 Mo. 478; *State v. Carlisle*, 57 Mo. 102; Wharton on Crim. Evid., section 673; 1 Greenl. Evid. (11 Ed.) section 219. The confessions afterwards made to other witnesses should have been excluded, as they are presumed to come from the same motive. *State v. Jones*, 54 Mo. 478; *State v. Brown*, 73 Mo. 631. (2) There is no competent, legal evidence connecting defendant, Reed, with the crime charged in the indictment. The statement of defendant, Fredericks, to the witness, Hereford, that "he would not have taken the horse, but for Reed," should have been excluded. Also, the evidence of the distinct crime of stealing Kyle's horse by Fredericks. Even if a common design had existed between defendants, together to take the horse in question, a confession made by either of them after its abandonment was inadmissible against the other. 1 Greenl. Evid., section 111; *State v. Ross*, 29 Mo. 32, 50; *State v. Duncan*, 64 Mo. 262, 266, and cases cited; *Laytham v. Agnew*, 70 Mo. 48; *State v. Dean*, 13 Iredell, 36. (3) Instruction number one given on the part of the state, is erroneous. Neither of the defendants was indicted as an accessory, either before or after the fact. It was doubtless predicated upon a supposed admission of the defendant, Reed, to the witness, Kyle, that while he did not take the horse, he was accessory to it. It was calculated to mislead the jury. An accessory is not "one who stands by and aids, abets, or assists," in the commission of crime. 1

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Hale 615; 1 Wharton Crim. Law (6 Ed.) section 134. Instruction number three, given on the part of the state is erroneous and bad; for it assumes that the horse was stolen. *Merritt v. Given*, 34 Mo. 98; 34 Mo. 147; *Peck v. Richey*, 66 Mo. 114; *Moffatt v. Conklin*, 35 Mo. 453 *State v. Dillahunty*, 18 Mo. 331. Instruction numbered two asked by defendants should have been given, and the court erred in changing and modifying instructions numbered five and six as asked by defendants. (4) The verdict is bad, there being no separate assessment of punishment as required by law. *State v. Gay*, 10 Mo. 441; *Barada v. State*, 13 Mo. 94; *State v. Berry et al.*, 21 Mo. 504, 507; *Curd v. Com.*, 14 B. Monroe, 386; *Burnett v. State*, 30 Tex. 521; *Allen v. State*, 34 Tex. 230; 1 Bishop on Crim. Proc. (3 Ed.) section 1036; Kelly's Crim. Law and Prac., section 388; Revised Statutes, 1928. The judgment does not conform to the verdict.

B. G. Boone, Attorney-General, for the state.

(1) These confessions were properly admitted. *State v. Patterson*, 73 Mo. 690; *State v. Simon*, 50 Mo. 370; *State v. Carlisle*, 57 Mo. 104; *State v. Hopkirk*, 84 Mo. 273. (2) The evidence was amply sufficient to show that defendant, Reed, was connected with, and a party to, the stealing of Gentry's horse, and the law on that point was correctly stated to the court. The testimony of Gentry, Wirt, W. S. Reed, father of defendant, Reed, and defendant, Reed's, own testimony clearly shows Reed's connection with the stealing. (3) It is also insisted by appellant that the verdict is bad, there being no separate assessment of punishment. This objection is not well taken. The record shows that the defendants received the *minimum* punishment, and could not, therefore, be injured or affected by the alleged informality of the verdict. (4) The indictment is sufficient, and the instructions given by the trial court are clear and correct declarations of the law of this case, and no substantial

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error is apparent on the record, and the judgment should be affirmed.

HENRY, C. J.—The defendants were jointly indicted for stealing a horse, the property of one Thomas E. Gentry. They were tried jointly and found guilty at the November term, 1884, of the Cass circuit court and sentenced to imprisonment in the penitentiary for a term of two years. From the judgment they have appealed.

The first complaint made is that the confession of the defendant Reed was admitted as evidence against him, and it is contended that he was induced to make it by promise of reward. Before the arrest of defendants, or either of them, in the state of Kansas, one E. N. Wirt, with whom the horse in question and another were left by Fredericks, having had his suspicions aroused that the horses were stolen, went in quest of Reed, who had been at Wirt's stable in company with Fredericks whom he had introduced to Wirt as Owen, and found him in the county some distance from Humboldt. On inquiry Reed told Wirt that he was going to see a gentleman in the county, naming him, to get him to identify the horses. Wirt told him there was no such man in the county, and that he did not believe a word he said about the horses, and that he had just as well tell what he knew about it; that he had had Owen arrested. Witness further said: "You had better turn state's evidence, and we could fix the matter up and get the reward offered for the horses. I have a man in front of you and one behind you and for you to get away is impossible." Reed replied that it would take a good man to arrest him. Wirt told him that he did not want to arrest him. Defendant had his hands on his revolver, about half drawn from his pockets. After further conversation, Wirt said to him: "You had just as well make the thing straight." This was immediately after Reed had consented to go back to Humboldt with Wirt. Reed then told Wirt that one of the horses belonged to Gentry and

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the other to Kyle, also told when they were taken, and that Owen's true name was Fredericks.

I cannot see that this confession was either extorted from Reed, or induced by a promise of reward. It is well settled that a confession is not rendered inadmissible because made under a supposition that the accomplice of the party making it is in custody, when in fact he was not, although the impression that the accomplice was in custody was created by artifice, with a view to obtain the confession, unless the artifice used was calculated to produce an untrue confession. Wharton's Criminal Evidence, section 670. Wirt was not an officer, did not arrest or attempt to arrest Reed. Reed was armed, Wirt was not. Wirt had no interest in the stolen property. Mere suggestions or advice to the accused, or even solemn adjurations by one holding no official position, to confess, will not make the confession inadmissible. Wharton's Crim. Evid., sec. 669. This is true as a general proposition, but in all cases the age, experience, intelligence and constitution of the party, and the circumstances under which the confession was made are to be taken into consideration in determining the question of its admissibility. Greenl. Evid., sec. 225. We think there was nothing in the proposition made to the witness to "turn state's evidence and with Wirt get the reward offered for the horses" likely to lead to a false confession.

There was evidence admitted of a declaration made by Fredericks that he would not have taken the horses but for Reed, and also of a declaration made by Reed that he was to meet Fredericks on Friday night, the eighth of August, for the purpose of taking the Gentry horse. This declaration of each should have been excluded, as against the other. *State v. Duncan*, 64 Mo. 263; *Laytham v. Agnew*, 70 Mo. 48; *State v. Reed*, *post*, p. — "Declarations of confederates against each other are only admissible as a part of the *res gestae*, and unless they accompany acts done in the prosecution of the common

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object, they are inadmissible." After the accomplishment or abandonment of the common enterprise, no declaration of one conspirator will affect another. See cases above cited. The court, it is true, gave one instruction for the state and one requested by defendants, telling the jury that any statement made by either of defendants, after their arrest, implicating the other should be disregarded by them. It is difficult to get a confession before the jury to the extent to which it is admissible, when it consists of matter implicating, not only the party making it, but another; but when the objection was made, the court should have directed the witness to state only so much of the confession of the party making it as concerned that party. Instead of that, the court overruled the objection and admitted the evidence, and then attempted to remedy the wrong done by instructions. If the court in overruling the defendants' objection had given the caution to the witness which we have indicated, and afterwards the objectionable evidence had been given by the witness inadvertently, because of its intimate connection with the admissible portion, or perversely, we should not be inclined to reverse the judgment when, by an instruction, the court had done all in its power to destroy the effect of such evidence upon the minds of the jurymen. But, in this case, a specific objection to the testimony was overruled, and it went to the jury with the sanction of the court. It was of a character to prejudice each of the defendants. And in the *State v. Hopper*, 71 Mo. 425, it was held that an instruction to disregard evidence improperly admitted would not cure the error of admitting it if it was of a character to prejudice defendant's case.

With respect to the other instructions, section 1649, Revised Statutes, we think has virtually abrogated the distinction between principals and accessories before the fact. It is as follows: "Every person who shall be a principal, in the second degree, in the commission of any felony, or who shall be

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accessory to any murder, or other felony before the fact, shall upon conviction, be adjudged guilty of the offence in the same degree, and may be charged, tried, convicted and punished in the same manner as a principal in the first degree." There was, therefore, no necessity for instructions with respect to accessories before the fact. Whether present or absent when and where a felony is committed, if a party advises, counsels, or encourages its perpetration, he is guilty of perpetrating it, since he may be charged, tried, convicted, and punished in the same manner as principal in the first degree. This leaves no distinction between a principal in the first degree and an accessory before the fact, except in name.

The instructions were substantially correct. The judgment is reversed and the cause remanded for the reasons herein indicated. All concur.

BAUM *et al.*, Appellants, v. FRYREAR.

1. **Practice in Supreme Court: WEIGHT OF EVIDENCE.** The Supreme Court will not weigh the evidence and disturb the verdict of a jury, or a court sitting as a jury, unless there is no evidence at all upon which to base it.
2. **Practice: DEMURRER.** Where there is any evidence at all to sustain an issue, a demurrer to the evidence should not be sustained.
3. **Partnership: DEBT: RELEASE: EVIDENCE.** In an action against a member of a dissolved partnership for a debt of the partnership, where the defence is a release of the defendant by the creditor, and the acceptance of the new partnership as the debtor, pleadings and papers in an action of attachment against the new partnership by the creditor for his debt are admissible to show the intention to release.
4. **Practice: INSTRUCTIONS.** It is not error to refuse an instruction embodied in one given.

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Appeal from Johnson Circuit Court.—HON. N. M. GIVAN, Judge.

AFFIRMED.

J. J. Cockrell and W. W. Wood for appellant.

(1) The court erred in admitting in evidence the record in the case of *Baum & Company v. Reeves Brothers*. The rule is well settled that when a partnership is dissolved and a new partnership formed, the debts of the old firm may, by consent of all parties—the creditors, the old firm and the new—be transferred to the new firm and the old firm discharged. *Appleton v. Kennon*, 19 Mo. 637; *Patterson v. Camden*, 25 Mo. 13; *Powell v. Charless*, 34 Mo. 485; *Spaunhorst v. Link*, 46 Mo. 197; *Leabo v. Goode*, 67 Mo. 126. But it is also well settled that the simple acceptance, by the creditor, of the new firm for the debt, will not operate to release the old firm. To extinguish the obligation of the old firm it must appear that the subsequent obligation was by agreement accepted in lieu thereof, otherwise the second obligation will be regarded only as collateral, and additional to the first. *Briscoe v. Callahan*, 77 Mo. 134; *Powell v. Charless*, *supra*; *Leabo v. Goode*, *supra*; *Spaunhorst v. Link*, *supra*; *Cockrill v. Johnson*, 28 Ark. 193; *Smith v. Brown*, 28 La. Ann. 299; *Choppin v. Gobbold*, 13 La. Ann. 338; *Guils v. Osceola*, 14 La. Ann. 54; *Carriere v. Labiche*, 14 La. Ann. 211. The record in the case of *Baum & Company v. Reeves Brothers*, if even the plaintiffs had known that Reeves & Company and Reeves Brothers were different firms, would have no tendency to prove anything more than that plaintiffs had accepted Reeves Brothers as additional security, and would have no tendency to prove an agreement to accept them in lieu of Reeves & Company. If the deed of trust from the Reeves to Wood was introduced for the pur-

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pose of proving that the Reeves had agreed to assume the indebtedness from Reeves & Company to plaintiffs, it was, perhaps, admissible for that purpose, but it did not tend, in any manner, to prove that plaintiffs had agreed to accept them in lieu of Reeves & Company. (2) The court erred in refusing the second, fourth and fifth instructions asked by plaintiffs.

O. L. Houts for respondent.

(1) The court did not err in refusing instructions numbered two, four, and five, asked by appellants. Numbers one and three, given for appellants, covered the whole case. (2) There was evidence to support the finding of the court. "Very slight evidence is required to show that plaintiffs accepted the liability of the new firm instead of the old." *Register v. Dodge*, 6 Federal Rep. 6. Plaintiffs, under their writ of attachment, levied upon sufficient personal property of Reeves Brothers to pay their debt and costs, and the release of this attachment will operate as an extinguishment of the debt as to defendant. *Blair v. Caldwell*, 3 Mo. 315; *State ex rel. Colvin v. Six*, 80 Mo. 61; *Rice v. Morton*, 19 Mo. 263; *Lower v. Buchanan Bank*, 78 Mo. 67.

EWING, C.—This was a suit to recover on an account for merchandise sold to Reeves & Company, of which firm the defendant was a partner. The answer admitted the purchase of the goods by Reeves & Company, and admitted the indebtedness, but pleaded in defence that defendant, Fryrear, had sold his interest in Reeves & Company (which was composed of Reuben Reeves and C. Fryrear), to Frank Reeves; that Reeves and Brother assumed the payment of the plaintiffs' debt, with others of the old firm, and continued the business under the name of Reeves Brothers. That plaintiffs released defendant from all liability and accepted Reeves Brothers as their debtor. By consent, the case was tried by the

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court without a jury, and upon hearing the evidence it found for the defendant.

I. The court, then, being the trier of the facts, and having found for the defendant, we cannot disturb the finding, unless there was no evidence at all upon which to base it. This court will not weigh the evidence and undertake to say the finding is not sustained by the weight of the evidence. If there is any evidence tending to prove the issues, the finding must be left to the court trying the case, or the jury. The evidence tended to prove that Reeves & Company dissolved partnership, by Fryrear, one of its members, selling out to Frank Reeves; that the new firm assumed the payment of plaintiffs' debt. Then there was written and oral testimony offered on both sides for the purpose of showing that plaintiffs released the old firm and accepted the new. From all the circumstances, we think the evidence was properly admitted, and which might be considered in making up the verdict. The court, upon all the evidence and circumstances, found for the defendant, and that finding we cannot disturb.

II. The next and only remaining question is as to the instructions. The plaintiff asked the following instructions:

"1. Although the court, sitting as a jury, may believe from the evidence that the plaintiffs, in consideration of the sum of one hundred and four and eighty one hundredths dollars, released Reuben Reeves from any liability on the indebtedness of Reeves & Company to the plaintiffs, yet such release did not of itself operate as a release of defendant's liability on such indebtedness."

"2. It devolves upon the defendant to prove affirmatively that the plaintiffs agreed either with the defendant, or with Reeves Brothers, to release the defendant from any liability on account of the indebtedness of Reeves & Company to the plaintiffs, and to accept Reeves Brothers for the same."

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"3. The court declares the law to be that it devolves upon the defendant to establish affirmatively by the evidence the defences set up in his answer, and unless defendant has so established said defence, the finding of the court will be for plaintiffs."

"4. If the court believes from the evidence that plaintiffs had actual knowledge of the sale of the interest of defendant to Frank Reeves, and brought their action in attachment against Reeves Brothers without such knowledge, then their action in said suit, and the pleadings and papers therein, cannot be received as evidence of any intention to release defendant from his liability to them unless it is further shown from the evidence that plaintiffs accepted a part of the money derived from a sale under the deed of trust in favor of W. W. Wood, trustee, knowing the source from which said money came."

"5. The court declares that defendant has introduced no evidence to support the allegations of the answer."

The first and third were given, and the others refused. The fifth, being in the nature of a demurrer to the evidence, was properly overruled, as we hold that there was evidence sufficient to go to the jury. The fourth, we also think, was properly refused. The evidence referred to by that instruction was, we think, competent and proper to go to the jury, and upon which the instruction is based. It was not error to refuse the second instruction, because it is fully covered by the third. The defence set up in the answer was to the effect that the plaintiffs released the defendant from liability, and accepted Reeves Brothers in his stead, so that if the defendant established the defences in the answer, it was sufficient.

The judgment below is affirmed. All concur, except Henry, C. J., absent.

The State ex rel. School District No. 6 v. Riley.

THE STATE *ex rel.* SCHOOL DISTRICT NO. 6, v. RILEY,
County Clerk.

1. **School Districts : CHANGE OF BOUNDARIES : COUNTY COMMISSIONER.** A county school commissioner, when deciding as to the change of boundaries of school districts, referred to him under Revised Statutes, section 7023, cannot change such boundaries otherwise than as proposed in the election held under the statute. He must confine himself to the question whether the change proposed in said election shall, or shall not be made.
2. **Mandamus.** Mandamus will lie to compel the county clerk to assess the school taxes of a district on the taxable property therein, according to its legal limits.

Appeal from Buchanan Circuit Court.—HON. W. H. SHERMAN, Judge.

REVERSED.

J. W. Boyd for appellant.

(1) An appeal lies from the judgment of the court in this case. R. S., sec. 3258; *Ex parte Skaggs*, 19 Mo. 339. (2) Mandamus is the proper remedy to compel the county clerk to discharge his duty in extending the estimate of school taxes on the property within the district. *State ex rel. v. Byers*, 67 Mo. 706; *State ex rel. v. Heath*, 56 Mo. 231. (3) The county school commissioner has not the legal authority to change the boundary lines between school districts at his pleasure; he could not establish a boundary line different from the one voted on. The line which he attempts to establish cuts off from district six the land mentioned in the alternative writ, and as this action of the school commissioner is without authority, and absolutely void, this land is still in district six, and the court ought to so find in this kind of a proceeding. 56 Mo. 231; 58 Mo. 297. The case in 67 Mo. 706, is in many respects like this case; and under

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the law, as there laid down, and in section 7023 of the statutes, the relief asked should be granted.

B. J. Woodson for respondent.

The peremptory writ of mandamus was properly refused. The evidence in this case shows that district number five was formed in accordance with law, and has been acting as such school district for more than two years next before the bringing of this suit. If it be true, as appellant contends, that under section 7023 the commissioner had no power to vary the line voted on, *quo warranto* is the only proper remedy. 62 Mo. 247-252; 16 Mo. 88; 84 Ill. 162, 163; *People v. Maynard*, 15 Mich. 463, 470; Cooley on Const. Lim. (5 Ed) 311, side page 254, and cases cited. The formation of district number five, after its existence for more than two years, cannot be inquired into, or impeached, in a collateral proceeding. *Rawson v. Von Riper*, 1 Thomp., etc. (N. Y.) 370, or 5th U. S. Digest, new series, 677, Title Schools, sec. 12; 23 Ill. 463; 62 Mo. 252; *Rice v. Shieles*, 58 Mo. 116-122. The county clerks can only take school districts as they are furnished them by the school officers of their respective counties.

DEARMOND, C.—School district number five lay immediately north of and adjoining school district number six. The two districts voted upon a proposition to change their boundaries by taking out of the northeast corner of district six a mile square of its territory and giving it to district five. Number five voted for, and number six against the proposed change. The matter then went to the county commissioner, who decided to change the dividing line between the districts, by taking from number six and adding to number five, a strip two and a half miles long, from east to west, and varying in width from north to south from one-fourth to a half a mile. Thus, it is seen the commissioner assumed the

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power to detach from six and attach to five a portion of the mile square, a larger extent of territory not embraced in the proposition upon which the district voted. To be exact in statement, the commissioner took from six and added to five, two hundred and forty acres of the mile square before mentioned, and three hundred and sixty acres not alluded to in the proposition upon which the people voted. He transmitted to the clerks of the respective districts his said decision. The decision was entered upon the records of district five, but not upon those of district six, where it was disregarded. Number six sent to the county clerk the usual estimates for the district. The clerk refused to extend upon the proper books the assessment against the property which, by action of the commissioner, had, as it is claimed, gone from number six to number five, but assessed and extended the amount of the estimates on and against the residue of the property in number six. This is a proceeding to compel the clerk, by mandamus, to assess and extend the school taxes of district number six against the real estate and other property in the disputed territory, subject to taxation. Upon the hearing, the alternative writ was dismissed, and the peremptory writ denied; and judgment entered against relator for costs. The record presents two questions, one as to the validity of the decision of the county commissioner, the other as to the remedy.

I. The power and authority of the county commissioner is derived from section 7023, Revised Statutes. The proposition to make the specified change having been voted upon in the several districts to be affected, such change shall be at once accomplished, if all of said districts vote in favor of it, "but if a part of the districts affected vote in favor of, and a part against, such change, the matter shall be referred to the county commissioner for final decision, who shall proceed to inform himself as to the necessity of the *proposed change*, and and his decision thereon shall be final." That the de-

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cision which the commissioner is authorized to make, is final, is expressly decided in *State ex rel. v. Young*, 84 Mo. 90, opinion by Martin, commissioner. But what decision is this officer authorized to make? Must he confine himself to a decision that the proposed change shall be, or shall not be made? Or, the voters of the districts to be affected, having disagreed as to the making of the proposed change, is the commissioner then clothed with authority to make another and different change by a decision that shall be final? We cannot, by a forced, unnatural construction, disfranchise the citizen for no greater offence than that of having exercised the lawful privilege, and discharged the lawful duty of voting upon a proposition submitted to vote, and affecting the welfare of himself and neighbors. As well might a justice of the peace, and his decision is not final, in a proceeding on the complaint of a wife to place the husband under bond to keep the peace, release the wife from the bond matrimonial.

II. Then will mandamus lie against the county clerk to compel him to assess the school taxes of said district six, agreeably to the said estimates against the taxable property therein, according to the old, and legal limits of said district? I answer, yes, upon the express, and, as I think, conclusive authority of *State ex rel. v. Byers*, 67 Mo. 706, opinion by Judge Henry. The peremptory writ should have issued; hence the judgment must be reversed and the cause remanded. All concur.

Peddicord v. The Mo. Pac. Ry. Co.

PEDDICORD V. THE MISSOURI PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Pleading:** AMENDMENT: JUSTICE OF PEACE. An amended statement cannot be filed in the circuit court on appeal from a justice's court when no statement was filed in the latter court.
2. **Railroad:** DOUBLE DAMAGE ACT. Where in an action against a railroad under the double damage law (R. S. sec. 809) for the value of a bull killed by its train, the evidence shows that the bull was in a pasture which did not adjoin the railroad, and escaped therefrom into the pasture of one S., and thence onto the railroad track, there can be no recovery without proof also, that the fence through which the bull escaped into the pasture of S. was a lawful fence.

Appeal from Lafayette Circuit Court.—HON. JNO. P. STROTHER, Judge.

REVERSED.

Robert Adams and G. N. Bowles for appellant.

(1) The statute relating to amendments cannot be construed so as to authorize a judgment against a party not brought into court by a summons as required by law.
(2) The court erred in overruling the defendant's demurrer to the evidence at the close of the case. By plaintiff's own testimony it appears that his bull was a trespasser upon the land of Stewart, and he failed to show that the partition fence between the two pastures was not a lawful one. *Berry v. Ry.*, 65 Mo. 172; *Harrington v. Ry.*, 71 Mo. 384.

Graves & Shewalter for respondent.

EWING, C.—The record in this case shows it to have been a proceeding by the plaintiff herein and against the defendant before a justice. The transcript of the justice of the peace shows that "complaint was filed, sum-

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mons issued * * * returned, served as the law directs," etc., but the record does not contain a copy of the complaint before the justice, nor does it contain a copy of the summons or the constable's return thereon. There was judgment before the justice by default; then an appeal to the circuit court, where upon motion of the plaintiff the court granted him leave to file an amended statement, which was done, and also asked leave for the constable to amend his return, and that the justice have leave to amend the original summons; all of which was granted. But no original summons nor any constable's return appears of record.

The defendant then moved the court to dismiss the suit for want of jurisdiction, and for insufficiency of the amended statement which was as follows: "The plaintiff for amended statement, filed by leave of the court first had and received, avers that the defendant is a corporation duly incorporated for railway purposes, and as such is now and was on the twenty-eighth day of July, 1881, operating a railroad, running from Sedalia, Pettis county, Missouri, to Lexington, Lafayette county, commonly known and called the Lexington branch of the Pacific railroad, which said road ran through Dover township, in said county; that the defendant failed to erect and maintain along the line of said road, a good and sufficient fence where the same runs through enclosed and cultivated lands in said Dover township, in said county; that on the twenty-eighth day of July, 1881, in Dover township, Lafayette county, Missouri, and not at a public crossing, or within the limits of any incorporated town or city, through the failure and neglect of the defendant, as aforesaid, to erect and maintain its fences, a fine and valuable bull of the plaintiff's got upon the railroad track of the defendant's in said Dover township, said county and state, and was by the engine and cars of the defendant then and there run and managed by the servants of the defendant in and about its business, so in-

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jured and mangled in said Dover township that the same could not live and was by the agent of the defendant, afterwards killed. That said bull was of the value of one hundred dollars, for which sum of one hundred dollars and costs defendant (plaintiff) asks judgment, and that said judgment for one hundred dollars be doubled according to the provisions of the statute in such cases made and provided." The defendant then objected to any evidence being offered because the statement is not sufficient.

The evidence tended to prove the allegations of the statement, and upon cross-examination of the plaintiff, he stated: "I had the bull in Mr. Gordon's pasture; was pasturing him there. The bull got out of Mr. Gordon's pasture into Mr. Stewart's pasture, and from Stewart's pasture, by passing under the railroad bridge where the fence was down onto the railroad track where the fence was not good." Upon the close of the evidence the defendant demurred to the evidence, which was overruled, the case given to the jury and there was verdict and judgment for the plaintiff, from which the defendant brings the case here by appeal.

I. Section 2851 of the Revised Statutes, 1879, provides that "no formal pleadings upon the part of either plaintiff or defendant, shall be required in a justice's court, but before any process shall be issued in any suit, the plaintiff shall file with the justice the instrument sued on, or a statement of the account, or of the facts constituting a cause of action upon which the suit is founded." Section 2852 provides for a dismissal of the suit if no statement be filed. It follows that if there was no statement filed before the justice (and the record shows none), there was nothing on which to base the judgment of the justice, and of course nothing to amend. This would dispose of this case, but taking it for granted some statement was filed with the justice, we deem it best to further remark in the case.

II. The statement as amended we consider suffi-

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cient; but the evidence discloses the fact that the bull did not get on the track from the premises of the plaintiff, but plaintiff had his bull in the pasture of a Mr. Gordon, out of which he escaped into the pasture of one Stewart, and from thence onto the railroad track at a place where the fence was not good. In *Berry v. St. L., S. & L. R. R. Co.*, 65 Mo. 172, it was held by this court that "the duty of fencing the sides of their roads, through enclosed and cultivated fields, is imposed upon railroad companies for the benefit of the owner or proprietor of such fields and enclosures." In other words, that if a railway company owns a road running through the enclosed and cultivated fields of A, and does not have its road fenced as the law directs, it would not be liable for damage done to the cow of B, provided the fence around A's field was a lawful fence. That, notwithstanding B's cow got onto the company's track, from A's field, where there was no fence between it and the railroad track, yet B could not recover unless he should show by the evidence that the outside fence around A's field was not a lawful fence at the place where his cow entered A's field. This decision was followed in *Harrington v. The Chicago, Rock Island and Pacific Railroad Company*, 71 Mo. 384, and again in *Johnson v. Mo. P. Ry. Co.*, 80 Mo. 620. In the case at bar the evidence of the plaintiff himself shows that the bull was in Gordon's pasture; escaped from there into one Stewart's pasture, and thence onto the railroad track. There was no evidence, whatever, as to the fence of Stewart; whether lawful or defective it is not shown; and without which, as shown by the decisions referred to, plaintiff cannot recover. And, therefore, for failing to sustain defendant's demurrer to the evidence, the judgment of the circuit court is reversed and the case remanded. All concur.

Philpott v. The Mo. Pac. Ry. Co.

PHILPOTT *et al.* v. THE MISSOURI PACIFIC RAILROAD
COMPANY, *Appellant.*

1. **Action for Death of a Person : NON-RESIDENTS : REVISED STATUTES, SECTION 2121.** The right of action given by Revised Statutes, section 2121, for the death of a person occurring in this state by reason of the negligent act of a railroad, is not limited to residents of this state.
2. ——— : **MINORITY : LAWS OF ANOTHER STATE : PRESUMPTION.** Where in such action brought here by a husband and wife, residents of the state of Texas, for the death of their minor son, who was also a resident of Texas, the laws of this state, and not of Texas, will determine the question of the minority of the son. Besides, in the absence of any evidence to the contrary, it will be presumed that the age of majority is the same in Texas as it is here.
3. ——— : **EMANCIPATION OF SON.** Section 2121, of Revised Statutes, is both penal and compensatory, and the emancipation of a minor son by his parents is no defence to an action thereon by them for his death.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

H. S. Priest and T. J. Portis for appellant.

(1) The date of the emancipation of an infant, as fixed by law, is purely arbitrary. There was no proof in this case of the duration of the period of infancy in the state of Texas. (2) This state, by its statutory law, can not create or affect that period, or so far extend its jurisdiction over the wards of the state of Texas as to affect the relation of parent and child, or ignore what might, upon proof, have shown a legal and binding emancipation, sanctioned by the laws of that state, allowing such contracts between father and son to terminate this relation as to all the world. This right of action in this state is purely statutory, and in derogation of the common law, and arises solely by virtue of the relation of

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infancy, and that, together with the law as to when, how and by whom it should be terminated, depends solely upon the municipal laws of Texas, about which there was no proof. The right of the father to recover at common law for loss of services, depends solely upon proof of that fact. This was the gist of the action. 2 Kent's Com. (12 Ed.) 195. (3) The right of recovery under the statutes of this state is measured by a proper compensation for the loss of services by the death of the deceased to the person supposed by the legislature to have a pecuniary interest in the labors of such deceased. The rule is compensation. *Coover v. Moore*, 31 Mo. 574. A parent may emancipate his child and divest himself of any right of service. *Ream v. Watkins*, 27 Mo. 519. (4) The parents having emancipated the child, and the rule being compensation, the parents suffered no loss as charged in the petition, and, therefore, could recover nothing. *Stanbury v. Bertron*, 7 W. & S. (Pa.) 632; *Robinson v. English*, 34 Pa. St. 324; *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95; s. c. 7 Am. & Eng. R. R. Cases, 25.

Collins & Jameson for respondents.

(1) Section 2121, of Revised Statutes, is not in any respect contrary to the provisions of article 2, sections 10 and 30, of the constitution of this state, nor of section 1, of article 14, of the constitution of the United States. It falls under the head of police regulation laws, and is constitutional. *State, etc., v. Wabash, etc., Ry.*, decided December 1, 1884; *Kaes v. R. R.*, 6 Mo. App. 397; *Trice v. R. R.*, 49 Mo. 438; *Munn v. Illinois*, 97 U. S. 113; *Thorp v. R. R.*, 27 Vt. 140. (2) Said section 2121, of Revised Statutes, is penal, and the amounts of damages are liquidated and fixed by its terms. *Rafferty v. R. R.*, — Mo. App.; *Irwin v. R. R.* (decided by Judge McCrary, March 31, 1883). (3) The statute is not confined to citizens of this state. *Trice v. R. R.*, 49 Mo. 438;

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Stockman v. R. R., — Mo. App. (4) The statute being penal, the cause of action is not based on the loss of services. The parent cannot make a valid contract whereby he irrevocably divests himself of the custody of his children. *In matter of Scarrit*, 76 Mo. 565; *Courtright v. Courtright*, 40 Mich. 633; Schouler's Domestic Relations, 342. (5) To authorize a verdict for substantial damages in an action by a parent for the negligent killing of his infant child, it is not necessary to make proof of the amount of damages sustained. The jury may infer this from all the facts in evidence. *Nagel v. Mo. Pacific Ry. Co.*, 75 Mo. 653, 665; *Ihl v. Railroad Co.*, 47 N. Y. 317; *City of Chicago v. Major*, 18 Ill. 349; *Owen v. Brockschmidt*, 54 Mo. 289. (6) "In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence which a jury might, with any degree of propriety, make in his favor." *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 230; *Wilson v. Board of Education*, 63 Mo. 137.

BLACK, J.—The plaintiffs, husband and wife, recovered judgment against the defendant for the sum of \$5,000, because of the death of their minor son, between nineteen and twenty years of age, occasioned by the collision of two trains of cars on the defendant's road, at Washington, in this state. The son was, on the night of the thirtieth of May, 1881, traveling in the caboose car of a stock train, in charge of stock, when this car collided with the caboose car of another train. From the effect of the injuries thus received he died in some ten or twelve days. The collision was occasioned by the negligence of defendant's servants, as found by the jury. The defendant, among other things, answered that the plaintiffs and their son were residents and citizens of the state of Texas; and, further, that they had emancipated their son from all paternal control and interference. These

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defences were, on motion of plaintiffs, stricken out. Of this ruling error is assigned.

1. The cause of action accrued in this state. The plaintiffs assert their rights under the provisions of our damage act. There is nothing in the act which, in the least, indicates a legislative intent to limit the rights thereby conferred to residents or to persons domiciled in this state. Its provisions are for the benefit of the traveling public—alike for the resident and non-resident.

2. There was no evidence as to what the age of majority is in the laws of the state of Texas. Proof of this, it is contended, was an essential element of the plaintiffs' case. We must be guided by our own law in this respect. As to acts done and rights acquired here, the laws of this state, and not those of Texas, must determine whether the son was or was not a minor. 4 Kent's Com. (12 Ed.) 233, n. c.; *Gilberth v. Bunce*, 55 Mo. 349. Besides, in the absence of any evidence as to what the age of majority is in that state, we must presume it to be the same as fixed by the common law of this state, which, doubtless, would be twenty-one years.

3. A father may emancipate his son, and when he has done so, the son will be entitled to his own earnings until the father sees fit to resume his authority. *Ream v. Watkins*, 27 Mo. 519. This being the law, it is insisted that the statute is compensatory, and because of the emancipation the parents are not damaged. This suit is based upon section 2121, Revised Statutes, 1879, which provides, so far as applicable to this case, that whenever any person shall die from any injury, occasioned by the negligence of any servant or employe while managing any car or train of cars, the corporation in whose employ such servant or employe shall be at the time such injury is committed, shall "forfeit and pay for every person so dying, the sum of five thousand dollars," which may be

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sued for and recovered, when the deceased is a minor and unmarried, by the father and mother, and each shall have an equal interest in the judgment. The statute is remedial and is designed to be compensatory in part. But it is more than this. The case at bar demonstrates the fact that it cannot be wholly compensatory, for the amount of the recovery, being fixed, as it is, is altogether out of proportion to the value of the services of the son for the remainder of the period of his minority. The law is also designed to guard and protect persons and the traveling public against the wrongful acts thereby prohibited. Whether the amount awarded is denominated damages, compensatory damages, liquidated, as was said in *Coover v. Moore, et al.*, 31 Mo. 574, or a penalty, is not material. The law, as well as being compensatory, is of a penal and police nature, and can, without objections, subserve both purposes at one and the same time. The right to recover is, therefore, not made to depend upon services which the deceased could have rendered to the persons suing. The emancipation of the son by the parent, if alleged and proved, constitutes no defence.

4. Other questions were raised on the trial and are preserved in the bill of exceptions, but as they are not pressed here, will not be considered.

Judgment affirmed. The other judges concur.

Cowell v. Gray.

COWELL, *Appellant*, v. GRAY.

1. **Taxes : ACTION TO ENFORCE LIEN FOR : STATUTE.** The "owner of the property" against whom, under Revised Statutes, section 6837, actions to enforce liens for taxes must be brought is the person appearing of record to be the owner, in the absence of notice to the contrary, and unless the suit is against such owner a sale under a judgment therein will convey no title.
2. **Land, Sale for Taxes : CESTUI QUE TRUST : REDEMPTION : EJECTMENT.** Where a deed of trust is of record and the *cestui que trust* was not made a party to the tax suit, he may redeem the land by paying off the judgment and may thus assert his title under the deed of trust. But in ejectment, where the pleadings present, at the only issue, the question of the mere legal right to the possession, the title under the judgment for taxes will prevail as against the one claimed under the deed of trust.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

R. S. Matthews and W. M. Rubey for appellant.

(1) The word *owner*, means the person, or persons in whom the fee is vested, and also those who have an equitable title or ownership. But such interests, whether legal or equitable, must appear of record at the time the suit is commenced. (2) In the tax suit, by which defendant derived title, the only person sued was Gray, who, at the time, had only an equity of redemption; the legal title having been conveyed by Rowland and his wife to F. M. Buster, in trust for plaintiff, before the institution of the tax suit and before Gray bought the equity of redemption of Rowland. (3) The legal title was in F. M. Buster, trustee for plaintiff. Neither the owner of the legal title nor the *cestui que trust* was made a party to the suit and consequently the legal title did not pass by the sale under tax proceedings. The purchaser

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at that sale bought himself into the equitable rights of the mortgageor, Rowland, and nothing more, which he had before tax suit. *Gitchell v. Kreidler*, 12 Mo. App. 437.

W. H. Sears for respondent.

EWING, C.—On the twenty-seventh day of August, 1879, the plaintiff, Cowell, commenced suit in the Macon circuit court to recover the possession of the northwest quarter of the southwest quarter of section seven, township fifty-six, range thirteen. The defendant answered, alleging title and possession in himself. It appears from the evidence that both parties claim under conveyances from Wm. B. Rowland, who was the original owner of the land sued for. That on April 1, 1878, Rowland executed and delivered a deed of trust to the premises to one Buster, as trustee for the plaintiff, Cowell. That deed of trust was filed for record April 27, 1878. Afterwards, a sale was had under this deed of trust by the sheriff of Macon county, acting for the trustee in his absence, at which sale the plaintiff, Cowell, became the purchaser. This deed is dated and acknowledged on the twenty-fourth day of July, 1879. The record does not show that this deed was recorded or filed for record. The plaintiff rested, and the defendant's evidence was a deed from Rowland to defendant, Gray, dated July 17, 1878, and a deed from the sheriff of Macon county to one J. W. Waller, dated January 29, 1879, and a deed from Waller to defendant, dated February 11, 1879. It was alleged in defendant's answer that the deed from the sheriff to Waller was made by virtue of an execution sale. That the collector of Macon county recovered judgment for back taxes on said land against defendant on the twenty-eighth of September, 1878, which was a lien on the land; that execution issued thereon and that the said Waller became the purchaser, etc.

It appears from the recitals in the sheriff's deed,

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under the tax-judgment, that the defendant, Gray, was the only party defendant to the suit of the collector for taxes. The judgment itself is not in the record, and the only information upon that subject appears from the recitals in the sheriff's deed. The deed of trust was filed for record on the twenty-seventh of April, 1878, and the judgment for taxes rendered September 28, 1878. But whether the deed of trust was so filed before the commencement of the suit for taxes does not appear. Section 6837, Revised Statutes, 1879, provides that suits for taxes shall be "against the owner of the property." This court in *Vance v. Corrigan*, 78 Mo. 94, in construing the charter of Kansas City, under and by authority of which the suit for taxes had been commenced and prosecuted, said that "the charter of the City of Kansas provides that all suits to enforce special tax bills, shall be brought against the owner of the land," etc., and notwithstanding the fact in that case that the person who appeared of record as the owner, had conveyed his interest to another, yet it was held that a sale under the judgment against the owner appearing of record as such in the office of the recorder of land titles, would carry the title as against the unrecorded deed, in the absence of actual notice thereof. The court in that case said: "If the defendant in the execution was in reality the owner of the land, the sale would undoubtedly pass his title, and if he appears by the record at the time of the sale, to be the owner of the land, the interest or estate in the land, of which his deed shows him to be seized, is subject to sale, and the purchaser of such interest at such sale will acquire the same under the registry act, unless such interest had been conveyed or incumbered, and the purchaser had notice thereof. *Fox v. Hall*, 74 Mo. 315.

The registry act provides that no conveyance of land shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record. R. S., sec. 693. The court in *Vance v. Corrigan*, *supra*, further

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say: "We are of opinion that the provision of the charter requiring the suit to be brought against the owner of the land, does not mean that it must, in order to render the judgment valid, be brought against the real owner, although holding by an unrecorded conveyance, but it means that suit must be brought against the person appearing by the registry of deeds, to be the owner, in the absence of notice to the contrary." The same doctrine was reaffirmed in *State ex rel. Hunt v. Sack*, 79 Mo. 661, and is thus settled so far as that question is concerned, to-wit: that it is sufficient to bring suit against the owner as appears of record. But in the case at bar, the record of conveyances showed the fact to be that the original owner, Rowland, before he conveyed to Gray, the defendant in this suit, and also the defendant in the tax suit, had conveyed it to the trustee, Buster, for the use of Cowell, the plaintiff herein; and the evidence shows that Gray had actual notice of that conveyance to the trustee, Buster, before Rowland conveyed to him (Gray), the deed to Buster, the trustee, not having been recorded at the time of the sale under execution at which Waller bought.

Now the law requires the suit to be "against the owner of the property." This court holds that that statute is complied with when the suit is against the owner as shown by the records of land titles. In this case the record shows the legal title to be in Buster, the trustee, held for the use of the *cestui que trust*, Cowell. The record, therefore, shows that a party having a beneficial interest in the land has not been made a party to the suit. So that outside of the question as to Gray's actual notice of this incumbrance, the judgment and sale thereunder does not convey the title as against the true owner, because the suit was not "against the owner of the property" as appears of record. In *Stafford v. Fizer*, 82 Mo. 393, it was decided that in suits for the enforcement of the state's lien for taxes, in cases where there shall be a deed of trust on record, if the *cestui que trust* is not

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made a party, his rights are in no wise affected. In such case it is also there held that the lien of the *cestui que trust* being inferior to that of the state, he may enforce his equitable right to pay off and redeem the superior lien for taxes and thus assert his title under his trust deed. In the suit at bar there was no equitable right sought to be enforced, but only a legal right to the possession sued for or claimed. Cowell, the plaintiff herein, being the *cestui que trust* in the deed of trust on record, not being made a party defendant, so far as it appears from the record before us, in the collector's suit for taxes, his rights were not affected, and he may yet set up and enforce his equity of redemption, possibly, in another proceeding; but cannot recover in the case at bar on his legal title.

The judgment below must, therefore, be reversed and the case remanded. All concur.

ALBERS *et al.*, Plaintiffs in Error, v. THE COMMERCIAL BANK.

1. **Bank : CHECK.** A drawer of a check on a bank can countermand its payment before the same is made, he being liable for the consequences of his act in doing so.
2. ——— : ———. Such drawer cannot recall the check after it has been paid to a holder in good faith and for value, nor can the bank do so for him.
3. **Check : NOTICE NOT TO PAY : BURDEN OF PROOF.** When timely notice not to pay a check is given by the drawer to the bank, the burden of proof that payment had already been made is on the bank.
4. **Check : PAYMENT OF.** Where a bank receives a check, pays the money or its equivalent to the holder, cancels and charges up the check to the maker, such acts must be regarded as a payment of

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the check, and such payment cannot be rescinded without the consent of the person to whom payment of the check was made.

5. **Bank : CHECK.** The liability of a bank to pay a check does not become fixed upon its mere presentment.
6. ——— : ———. In an action against a bank by the drawer of a check for the conversion of the sum for which it was drawn, the bank can show its proper payment to the holder without specially pleading such payment. The check being rightfully paid there could be no conversion.

Error to St. Louis Court of Appeals.

AFFIRMED.

W. C. Marshall for plaintiffs in error.

(1) The court erred in excluding the record of the suit of Bartholow, Lewis & Company, against the plaintiffs on the check in controversy. (2) The third instruction given for defendant was erroneous. *Dickinson v. Coates*, 79 Mo. 256. It proceeded upon the mistaken idea that a check drawn upon a bank in which the drawer has funds sufficient to meet the check, operates as an absolute appropriation of that much money in the hands of the banker to the use of the payee. *Merchants' Nat. Bk. v. Coates*, 79 Mo. 168. (3) The refusal of plaintiffs' instruction touching the rescission of payment by mutual agreement of the holder of the check, the drawers and the drawee, was erroneous. (4) The instruction given by the court of its own motion was erroneous. *Chase v. Alexander*, 6 Mo. App. 510; Story on Bills (4 Ed.) sec. 60; *Barber v. Dispatch*, 3 Mo. App. 377; *Meyer v. R. R.*, 45 Mo. 137. The court should not select particular facts and say they constitute payment. *Harner v. Hower*, 49 Pa. St. 477; *Steamboat v. Hammond*, 9 Mo. 58. The instructions given by the court were erroneous, because there was no plea of payment in the answer, and, hence, no issue of payment in the case. *Bank v. Armstrong*, 62 Mo. 70; *Hasset v. Rust*, 64 Mo. 325; *Crews v. Lackland*, 67 Mo. 619.

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Noble & Orrick for defendant in error.

(1) The record of the suit brought by Bartholow, Lewis & Company against the present plaintiffs was properly excluded in the circuit court. (2) The third instruction given at the request of defendant is not erroneous. *Merchants' Nat. Bk. v. Coates*, 79 Mo. 168, is inapplicable to the facts of this case. (3) The court properly excluded the evidence offered by plaintiffs, showing that at the time plaintiffs gave Caruthers & Company the check the latter owed them \$3,000.

BLACK, J.—The plaintiffs, partners under the firm name of Albers, McGinitie & Horner, sued defendant for \$3,000, which they alleged defendant received as deposit and refused to pay when requested. Albers, McGinitie & Horner, on the twenty-second of September, 1876, made their check on the defendant bank for \$2,602.09, payable to Caruthers & Company, who, on the same day deposited it with Bartholow, Lewis & Company, and thereby made their account with that bank good. On the next day this check was cleared on defendant, in the usual course of business. Plaintiffs and Caruthers & Company had dealings together, and this check was given partly for merchandise and partly for a check of the latter parties to the former. The merchandise amounted to some \$1,600. The excess was an "exchange" check for the accommodation of Caruthers & Company, who failed in business on the twenty-third of September, 1876.

The check of the plaintiffs, held by Bartholow, Lewis & Company, came to the defendant through the clearing house in the forenoon of the twenty-third of September, was then checked from the clearing house file and charged to the account of Albers, McGinitie & Horner. After this and between one and two o'clock in the afternoon of that day, a member of that firm notified Mr. Nichols, cashier of defendant, not to pay the check.

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The cashier then caused to be written upon the check, which had been cancelled, by placing upon a cancelling file, "cancelled by mistake." The charge upon the books was erased and the check handed to Bartholow, Lewis & Company's manager, who gave in exchange some checks and some money. Bartholow, Lewis & Company at once notified defendant that they would not receive the check. They afterwards filed a complaint with the clearing house committee. This arbitration committee determined that defendant should pay the check, which it did do, in December, 1876, and charged the amount again to the plaintiffs' account. Plaintiffs had no notice of this proceeding before the committee.

1. A customer of a bank has the right to countermand the payment of a check before it is paid, and take upon himself the consequences of such act. Morse on Banks and Banking (2 Ed.) 302. But he has no right to recall the check after it has been paid to one who took it in good faith and for value; nor can his banker do so for him. When timely notice not to pay is given, the burden of proof is with the bank to show that payment had been made. If the bank receives the check, pays the money or its equivalent to the holder, cancels and charges up the check to the maker, such acts must be regarded as payment, and this payment cannot be rescinded without the consent of the person to whom payment of the check was made. All these propositions were clearly enough presented by the instructions given.

2. The third instruction in substance states that if this check was given to Caruthers & Company, to use for the purpose of getting credit, and they did so use it, and the plaintiffs had funds with the defendant sufficient to pay it, the liability of defendant to pay became fixed on the presentation of the check, and it was not in the power of the plaintiffs or of defendant to refuse payment without the consent of the holders, Bartholow, Lewis & Company. This is not a correct statement of the law. The liability of the bank to pay the check did not be-

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come fixed upon mere presentment of the check. *Dickinson v. Coates*, 79 Mo. 250. But we do not see how the plaintiffs could have been prejudiced by this instruction, taken in connection with the others and the conceded facts of the case. It does not direct a verdict. All the evidence shows that the check had been paid before notice not to pay was given by the plaintiffs. The only question of any merit is, was the payment rescinded. Upon this there was some evidence tending to show an existing custom or usage among the banks at St. Louis, by which the bank receiving a check through the clearing house in the morning had until two o'clock of the same day in which to return it to the bank from which it came. There was, also, evidence to the effect that no such right existed when the check was "good" and had been cancelled. But little evidence was offered upon the alleged usage, the parties do not appear to have relied upon it, for no instructions were asked upon the subject. The existence of a custom, and what it was, are questions of fact. For these reasons we cannot dispose of the case here upon such grounds.

3. While it appears on the one hand that Bartholow, Lewis & Company notified defendant that they would not take back the check which had been handed to their messenger, and that they prosecuted their claim against defendant to successful determination before the clearing house committee, it appears on the other that they sued the plaintiff on the check by attachment on the same day it was handed to the messenger, which suit appears to have been dismissed. In view of this evidence, plaintiff asked an instruction, that though the check was paid on the twenty-third of September, 1876, yet, if after that and by mutual assent of the parties, the payment was rescinded, then the defendant had no right to again pay the check and charge it to the plaintiffs. When the check came to Bartholow, Lewis & Company, it bore the evidences and assertion of the defendant's "can-

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celled by mistake," when in fact it had not been cancelled by mistake at all. They declined to relieve the defendant, but at the same time sued the plaintiffs. Now, if they did not assent to a rescission of the payment, of which there is but little or no evidence, so far as the defendant is concerned, they had a right to retrace that step when informed of the real facts in the case. The instruction at first looks fair, but upon examination it will be found to be quite to the contrary, for if there was any rescission of the payment it could only be valid when made or acquiesced in after knowledge that the check had not been cancelled by mistake.

4. It was not necessary for the defendant to plead payment. If the check was rightfully paid there was no conversion. The whole record in the case of Bartholow, Lewis & Company against the plaintiffs in this case, was offered in evidence and excluded. We do not see how any part of that record, save the petition and affidavit, could have been competent evidence in this cause. All the facts with respect to the bringing and dismissal of that suit were in evidence without objections, and the plaintiffs had the full benefit of any deductions that might be drawn therefrom.

Affirmed. The other judges concur.

WISE V. THE JOPLIN RAILROAD COMPANY, *Appellant*.

1. **Negligence: RAILROAD: ESCAPE OF FIRE FROM ENGINE.** Proof of the fact of fire escaping from a passing engine and burning the property of another, makes a *prima facie* case of negligence against the railroad which provides and operates the engine.
2. **Pleading: NEGLIGENCE.** The petition in such case need only aver the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. Under such averments

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the plaintiff can show the negligence of the railroad in providing safe engines and also in operating them.

3. **Supreme Court: PRACTICE IN.** The Supreme Court will not reverse a cause so that the plaintiff may widen his petition to conform with the proofs admitted in the case, and compel the lower court to try the identical issue again. Nor will it do so to afford a party a benefit and an advantage he has already received.
4. **Negligence: ESCAPE OF FIRE: INSTRUCTIONS: VARIANCE.** The request of the defendant that the jury be instructed to find for it, if the fire escaped from the smoke-stack, instead of the fire-box or ash-pan of the engine, *held* properly refused, although the place of the escape of the fire was alleged in the petition to have been the ash-pan and fire-box. The evidence on the trial related to the locomotive engine, in providing and operating it, and whether the fire escaped from it through the ash-pan or through the smoke-stack was immaterial, unless the defendant was prejudiced by the supposed variance, which was not the case.

Appeal from Jasper Circuit Court.—HON. JOS. CRAVENS, Judge.

AFFIRMED.

John O' Day for appellant.

(1) The court erred in submitting to the jury the questions whether the company had used the best engine and machinery and the best appliances to prevent the escape of fire, and had employed skilful and competent servants. *Buffington v. R. R.*, 64 Mo. 246; *Waldhier v. R. R.*, 71 Mo. 514; *Edens v. R. R.*, 72 Mo. 212; *Carson v. Cummings*, 69 Mo. 325. (2) Plaintiff only avers that the fire was negligently suffered to escape from the ash-pan and fire-box, and grounds his right to recover on that statement; yet the court tells the jury that he can recover, if they find that the fire escaped from the engine, which includes not only the ash-pan and fire-box, but the smoke-stack, from which sparks are more likely to escape than any other part of the engine. This was error. Authorities, *supra*. (3) The court should confine its instructions to the is-

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sues made by the pleadings. *Camp v. Heelan*, 43 Mo. 591; *Bk. v. Armstrong*, 62 Mo. 59; *Iron Mt. Bk. v. Murdock*, 62 Mo. 70; *Fulkerson v. Thornton*, 68 Mo. 468; *Hassett v. Rust*, 64 Mo. 325; *Kenney v. R. R.*, 70 Mo. 252. (4) A petition in an action against a railroad company, for burning property, which simply states that the railway company's servants carelessly caused or allowed fire to escape, does not state sufficient facts to state a cause of action. *Weil v. Green Co.*, 69 Mo. 281; *Waldhier v. H. & St. J. R. R. Co.*, 71 Mo. 514; *Edens v. same*, 72 Mo. 212; *Harrison v. M. P. Ry. Co.*, 74 Mo. 364; *State ex. rel. v. Griffith et. al.*, 63 Mo. 545. (5) The instructions given at the request of plaintiff are irreconcilable with the instructions given by the court of its own motion for plaintiff, and with the instructions given for the defendant. Each instruction must, in itself, not only be correct, so far as it goes, but consistent with the other instructions given. *Henschen v. O'Bannon*, 56 Mo. 289; *Thomas v. Batt*, 45 Mo. 384; *Stevenson v. Hancock*, 72 Mo. 612; *Modisett v. McPike*, 74 Mo. 636; *Simmons v. Carrier*, 60 Mo. 581. (6) If erroneous instructions are given for one party, the error is not cured by the fact that correct instructions accompanied them, nor by giving for the other party instructions explanatory or contradictory to those first given; they should be expressly withdrawn from the jury. *Goetz v. H. & St. J. R. R. Co.*, 50 Mo. 472; *Jones v. Talbot*, 4 Mo. 279; *Hickendee v. Griffin*, 6 Mo. 37; *Singer Manufacturing Co. v. Hudson*, 4 Mo. App. 145.

J. W. McAntire for respondent.

(1) The instructions given for plaintiff are identical with the instructions for plaintiff approved by the Supreme Court in a similar case. *Poeppers v. Missouri, Kansas and Texas R. R. Co.*, 67 Mo. 716. (2) The plaintiff having shown that the fire originated from sparks escaping from defendant's engine, the burden of

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proof was on the defendant to show that the engine from which the sparks escaped was at the time equipped with the most improved mechanical contrivances employed to prevent the escape of fire. *Ill. Cent. R. R. v. Mills*, 42 Ill. 410; *McClelland v. Ill. Cent. R. R.*, 42 Ill. 354; *Fitch v. Pacific R. R. Co.*, 45 Mo. 322. (3) The fact that the fire which caused the damage sued for was set by defendant's engine would be *prima facie* evidence of negligence by those who ran it, or who provided the engine with its contrivances and would throw the burden of exonerating them upon the company. *Bedford v. Hannibal & St. Joseph R. R. Co.*, 46 Mo. 456. (4) Instructions refused by the court were properly refused, because from testimony introduced, showing that the fire had been scattered along its track, with no explanation of its cause, the jury is warranted in inferring some negligence of the company. *Fitch v. the Pacific R. R. Co.*, 45 Mo. 322; *Palmer v. Missouri Pacific Railway Co.*, 76 Mo. 217; *Redmond v. Chicago, Rock Island & Pacific Railway Co.*, 76 Mo. 550. (5) Where instructions taken as a whole series applying to all the phases of the case fairly present the law to the jury and are not calculated to mislead, the judgment will not be reversed. *Myers v. R. R.*, 59 Mo. 223. (6) If the plaintiff makes out a case upon which he can go to the jury, the court cannot, after the defence is in, assume it to be true and direct a verdict for defendant. *Woods v. Ins. Co.*, 50 Mo. 112.

MARTIN, C.—This was an action against a railroad for negligence in permitting fire to escape from its passing trains and burn the property of plaintiff. Suit commenced February 5, 1879. It is alleged in the petition, "That on or about the said second day of November, 1879, defendant, not regarding its duty in that behalf, did, whilst running its cars and locomotive engines upon the track of said railroad, by its servants and agents near by, and through the said tract of land of plaintiff in the state of Missouri and county of Jasper aforesaid, so neg-

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ligently and carelessly manage and control said cars and locomotive engine, that sparks of fire from the ash-pan and fire-box escaped, and by falling and lighting upon the dead grass and other combustible matter upon the track and right of way of said railroad, which defendant by its agents and servants had permitted to grow and accumulate thereon, set fire thereto, which fire so commenced and started on said track and right of way of said railroad, then and there spread and escaped therefrom and communicated to and set fire to the grass and other things standing and being on a tract of land of one Morrison adjoining thereto, and thence communicated and set fire to the fences, hedges and farm of plaintiff, and then and there burned and destroyed the following property belonging to plaintiff on said farm, to-wit: One hundred and twenty rods of rail fence of the value of two hundred and fifty dollars, and one hundred and twenty rods of first-class hedge of the value of two hundred and fifty dollars, all of the value of five hundred dollars."

It is further alleged, "that the agents, servants and employes in charge of said railroad, well knew that said fire had escaped and kindled in the manner as hereinbefore stated, but wholly disregarding their duty in that behalf failed and refused to extinguish said fire and to prevent its spreading, but went away and left the same burning until it communicated to the said farm of plaintiff and destroyed said property as aforesaid." To this petition the defendant made answer by general denial. The case was tried by a jury.

Some nine or ten witnesses were examined in behalf of plaintiff, in chief and in rebuttal. These witnesses testified substantially that on the second of November, 1873, near Carl Junction, a freight train of the defendant was going south; that its progress there was up a slightly rising grade; that on the defendant's right of way and between the tracks of its road there was dry grass, varying from six to twelve inches in height; that immediately

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after the train passed, the grass in two or three places on the track, as well as on the west side of it, was seen on fire; that it started right from the track and moved with the wind, which was blowing quite a gale towards the southwest; that before the train passed entirely by, the fire had spread half the length of it; that the train men could have seen it; that the train was not slackened nor whistle blown nor bell rung; that in twenty or thirty minutes it made its way into the fields on the west side of the track; that after crossing two roads and going over the premises of one Morrison it reached the plaintiff's farm, which was on the west side of the road, and burned eighty rods of rail fence and eighty rods of hedge fence; that no fire was seen on the east side of the road till the next day. Witness, Lane, testified: "I was just east of the railroad when the fire occurred. It seemed to me that the fire came up in the wake of the train. It rather left the track and went southwest. I think it started forty or sixty rods from where I was." Witness, True, who was within thirty rods of the train when it passed, said that he had just crossed the track from the east side; that before the train came up he saw the place where the fire started; that he saw the fire itself on the track, or close to it, on the west side of it as soon as the train had passed.

On the part of the defendant evidence in contradiction of the case contained in plaintiff's evidence was submitted. The conductor and engineer testified that as the train was going south on the occasion in controversy they saw no fire on the track or on the west side of the track, but that they observed a fire near some hay stacks on the east side of the track; that fires were pretty frequent in the country at that time, and that it would not require long for the fire which they saw near the stacks to jump across the track and reach the plaintiff's premises. The fireman testified that he saw no fire on either side of the track when the train went south, and that his attention was not called to, nor did he see the fire near the hay-

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stacks on the east side, but that when he returned the next day on his train going north he noticed that the road was burned on both sides of the track. Evidence was submitted by defendant tending to prove that the engine, smoke-stack, fire-box and ash-pan were constructed of the best materials and furnished with the best known appliances to prevent the escape of fire; that the engineer and fireman were experts, well trained and skilful, and that they conducted, managed and operated the engine in the most careful and skilful manner, and that no fire did escape from it on the day complained of.

The following instructions were given at the instance of plaintiff:

"1. The court instructs the jury that if they believe, from the evidence that the Joplin Railroad Company, on or about the second day of November, 1878, while running its locomotive steam engine and cars on the line of road in Jasper county, Missouri, through its servants, agents and employes, permitted the sparks and fire to escape from its engine and set fire to the grass along and by the side of its line of road, and damage ensued to plaintiff as alleged, then the jury may *infer* or presume that the fire escaped through the negligence of the defendant, its servants, agents and employes. And the court instructs the jury that in such case it devolves upon the defendant to rebut the presumption of negligence by proving that it was at such time using proper and safe locomotive and engine, and that its employes and servants were conducting them in a proper and safe way at the time the fire escaped, and unless the jury believe that the defendant has rebutted this presumption they will find for the plaintiff."

"2. The court instructs the jury that defendant in this case is bound to a degree of care and diligence in proportion to the degree of danger and the probable extent of injury to the property of others in case of negligence, and if the jury believe that, on or about the second day of November, 1878, the defendant, the Joplin

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Railroad Company, through its agents and employes, while operating its engines and trains of cars over the line of road in Jasper county, Missouri, failed to exercise that degree of care and caution they ought to have done under the circumstances, in consequence of which fire escaped from the engine of the train in their use, and set on fire the dry grass and combustible matter accumulated and standing alongside and by the railroad track, and thence by its natural extension communicated to and burned the property of plaintiff as alleged in his petition, they will find for the plaintiff."

Of its own motion the court gave the following instructions :

"1. The inference that because fire escaped from defendant's engine, which damaged the plaintiff, the defendant was guilty of negligence, is fully rebutted, that is, overcome, by the defendant's showing, to the satisfaction of the jury, that it used the best *machinery and contrivances to prevent the escape of fire*, and that careful and competent servants were employed by defendant, and if such inference of negligence is overcome by the evidence of defendant that it had the best *machinery and appliances* and careful and skilful servants, as aforesaid, then plaintiff cannot recover unless the plaintiff has proved to the satisfaction of the jury *other acts of negligence* of defendant which caused the escape of the fire."

"2. The court instructs the jury that, to entitle the plaintiff to recover, he must prove to the satisfaction of the jury : First, that the fire which caused the damage to plaintiff's property was set out and caused by the escape of fire from the fire-box or ash-pan of defendant's engine, and, second, that the escape of such fire was caused by or was the result of the negligence of defendant's agents, and if the jury believe from the evidence that defendant's engine was provided with the best appliances, in common use, to prevent the escape of fire, and was managed and run by a careful and competent

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engineer and fireman, who exercised due and careful precaution to prevent the escape of fire, then the plaintiff cannot recover unless the jury believe the defendant or its employes were guilty of actual negligence."

The court refused at the instance of defendant, to declare that as matter of law the case made by plaintiff was overthrown by the evidence of defendant and that the jury upon the evidence should find for defendant. It refused to instruct that the plaintiff could not recover if the fire escaped through the smoke-stack and not through the ash-pan or fire-box. It, also, refused to instruct that the one fact alone that the fire escaped from the engine and set out the fire that did the damage would not entitle plaintiff to recover. The jury returned a verdict for plaintiff in the sum of one hundred dollars. From the judgment on this verdict the defendant appeals.

The law governing this class of cases is so well settled in this state that it is only necessary to lay this case alongside of the most recent decisions of this court in order to dispose of the appeal. It is claimed by defendant that the petition fails to state a cause of action. That objection is answered by a reference to the case of *Palmer v. R. R.*, 76 Mo. 217, in which a petition almost identical with this, was held to be sufficient. As the principal ground of objection to the action of the court below, it is urged that the only pretended case of negligence stated in the petition consists of negligently running and controlling the engine so as to permit fire to escape; and that negligence in failing to provide a properly constructed and equipped engine is not mentioned at all, and that it was error in the court to submit any such issue to the jury. The ability and ingenuity with which the objection is argued by the counsel for the defence go so far towards demonstrating its logical correctness, that I would be inclined to approve it and reverse the case, if I were not satisfied that no practical good could result from such action, and that no actual injus-

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tice has been inflicted upon the defendant in the rulings of the court below, or in the verdict of the jury. It was at one time intimated in this state that the fact that fire was permitted to escape from a passing engine and consume the property of another, was not a fact from which negligence could be inferred. *Smith v. R. R.*, 37 Mo. 287. But the language and reasoning of the case containing this intimation has been denied, and it is now the settled doctrine of this state that the sole fact of fire escaping from a passing engine and burning the property of another raises a *prima facie* case of negligence against the company which provides and operates the engine. The citizen whose property is consumed is not in a position to easily ascertain whether the engine emitting the fire is properly constructed or equipped, or whether it is properly managed and controlled at the instant of the injury. Its swift transit affords no opportunity for inquiry or investigation. The facts of care and diligence which go to exempt the road from liability are peculiarly within the knowledge and command of its officers and managers. Accordingly the burden of rebutting and disproving the negligence which the escape of fire implies is placed upon the company, where it naturally belongs. This *prima facie* case of negligence can be rebutted by evidence that the engine from which the fire escaped was properly constructed and equipped, and that it was operated carefully and skilfully by competent employees. Such I understand to be our present law. *Fitch v. R. R.*, 45 Mo. 322; *Bedford v. R. R.*, 46 Mo. 457; *Coates v. R. R.*, 61 Mo. 38; *Haley v. R. R.*, 69 Mo. 614; *Poeppers v. R. R.*, 67 Mo. 716; *Kenney v. R. R.*, 70 Mo. 244; *Palmer v. R. R.*, 76 Mo. 217; *Redmond v. R. R.*, 76 Mo. 550.

It must follow from the law of these cases that the pleader in bringing his action need state only the substantive facts that the fire was negligently permitted to escape and burn the plaintiff's property. It is, therefore, unnecessary for him to allege that the fire escaped by

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reason of negligence in providing a safe engine, or negligence in operating the engine provided. Such allegations are superfluous, because the substantive fact of an escape of fire from it, so as to ignite neighboring property implies that the negligence must have happened in either or both of the two ways alluded to, viz.: in providing safe engines or in operating them. The allegation of the substantive fact in the petition advises the company of the necessity of repelling the inference of negligence by proof that the engine was properly constructed and that it was skilfully operated, thus leading to the conclusion that the accident was unavoidable and not the result of negligence. A pleader only runs the risk of narrowing the basis of his case when he goes beyond the necessary and substantive fact and indicates that the fire escaped by reason of negligence in operating an engine, and says nothing about any negligence in providing one properly constructed and equipped. The petition in this case is open to this objection and criticism.

But there are two reasons which forbid a reversal of the case on this account. The first one is that petitions identical with this one, so far as this point is concerned, have been treated as including within their scope and meaning negligence in providing machinery, as well as negligence in operating it, and as sufficient to put the defendant upon proof of care and diligence in both respects in order to repel the inference of negligence. *Palmer v. R. R.*, 76 Mo. 217; *Redmond v. R. R.*, 76 Mo. 550; *Kenney v. R. R.*, 70 Mo. 253. The other one is that the defendant at the trial was, without objection from plaintiff, allowed to introduce all its evidence in respect to the perfection and efficiency of its engine, as well as the care and skill with which it was operated. It thus appears that the material issue of negligence, which lies at the basis of this class of cases, in its unrestricted scope and meaning, went to the jury and was tried by the jury, and I do not think it would be just for the appellate

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court to reverse the case so that the plaintiff might widen his petition to conform with the proofs admitted in the case, and compel the lower court to try the identical issue again. There is no reason to presume that this correction would produce a different result at another trial. And while this action might perhaps be a proper tribute to the logic of the law, I am satisfied that it is not required by the justice and merits of the case.

The instructions given in this case seem to follow the language of instructions which have been approved in several cases of the same character, and I see no material objection to them. The request of the defendant to instruct, as a matter of law, that the plaintiff's case of negligence was rebutted by the defendant's evidence, was properly refused. The evidence of plaintiff in chief and in rebuttal made considerable more for him than the bare fact that fire escaped and burned his property. There were other facts tending to strengthen the *prima facie* case, which I need not stop to rehearse. Under the decisions of this court the issue was properly submitted to the jury. *Palmer v. R. R.*, 76 Mo. 217; *Kenney v. R. R.*, 70 Mo. 243. The request of defendant that the jury be instructed to find for defendant if the fire escaped from the smoke-stack instead of the fire-box or ash-pan, was not erroneously refused. It is true, that the place of escape from the locomotive engine is alleged in the petition to have been the ash-pan and fire-box. The negligence on trial related to the locomotive engine, in providing and operating it. Whether the fire escaped from it through the ash-pan or through the smoke-stack, is immaterial, unless the defendant has been prejudiced by the supposed variance. It was the locomotive engine in both events, and these are only different parts of it. That defendant has not been prejudiced by the supposed variance is apparent from the record. It seems to have accepted the escape of sparks from the smoke-stack as within the issue on trial, and, without objection from plaintiff, it submitted testimony tending to controvert

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the fact, by proving that the smoke-stack was of the most approved pattern, and that sparks did not escape from it. The plaintiff submitted no evidence expressly bearing upon the point, but rested upon the facts recited by us as tending to prove that the fire was caused by defendant in providing and operating its engine. The defendant could not have had a fairer trial, on the issue, than it has had, if the petition at the trial had been so amended as to have expressly charged an escape from the smoke-stack. Under these circumstances it will not do to reverse the judgment and remand the cause so as to afford the defendant to have a benefit and advantage which it has already received. There is nothing in the case upon which a different result could be predicated.

Upon the whole I am of the opinion that the judgment should be affirmed. The other commissioners concurring, it is so ordered.

THE STATE V. PEAK, *Appellant*.

1. **Practice.** Objections to admission of evidence come too late when made for the first time in the motion for a new trial.
2. **Criminal Law : SELF-DEFENCE.** Where, in a trial for homicide, it appears that the defendant commenced the difficulty, or brought it on by a wilful or unlawful act committed by him at the time or that he voluntarily entered into the difficulty, he cannot claim that the killing was done in self-defence, and in such case it makes no difference how imminent the peril might have been in which the defendant was placed during the difficulty.
3. **Evidence : DEFENDANT'S STATEMENTS.** Where, on the trial in a criminal case, the state proves statements of the defendant made after the commission of the offence, he is entitled to the benefit of what he said for himself, if true, as is the state to the benefit of what he said against himself. What he said against himself the law presumes to be true, because made against himself. But what he said for himself the jury are not bound to believe, because said

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in a conversation proved by the state, and may believe it, or disbelieve it, as it may be shown to be true, or false, by the evidence in the case.

Appeal from Sullivan Circuit Court.—HON. G. D. BURGESS, Judge.

AFFIRMED.

No brief for appellant.

D. H. McIntyre, Attorney General, for the state.

(1) The objection to admission of evidence comes too late in the motion for a new trial. *State v. Blan*, 69 Mo. 317; *State v. Williams*, 77 Mo. 310; *State v. Burnett*, 81 Mo. 119. (2) The seventh instruction given for the state, has been sanctioned in the following cases: *State v. Linney*, 52 Mo. 40; *State v. Underwood*, 57 Mo. 40; *State v. Brown*, 64 Mo. 367. (3) The ninth instruction correctly defines manslaughter in the third degree. R. S., sec. 1244. (4) The twelfth instruction for the state also correctly declares the law. *State v. Talbott*, 73 Mo. 547; *State v. Curtis*, 70 Mo. 594; *State v. West*, 69 Mo. 401.

EWING, C.—The defendant was indicted at the November term, 1881, of the circuit court of Sullivan county, for murder in the second degree, for the killing of one James R. Harbolt, in said county, on the third day of October, 1881. He was arraigned at the same term of court, and pleaded "not guilty," and being then put upon his trial was convicted of manslaughter in the third degree, and his punishment assessed at imprisonment in the penitentiary for the term of three years. He appealed to this court.

I. The evidence was all admitted without objection, nor was any evidence which was offered rejected by the court. It was too late to make any points upon the ad-

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mission, or rejection of testimony in the motion for new trial, and the point cannot be made in this court for the first time. *State v. Blan*, 69 Mo. 317; *State v. Williams*, 77 Mo. 310; *State v. Burnett*, 81 Mo. 119.

II. It is alleged in the motion for new trial that the court erred in giving instructions numbered seven, nine, ten and twelve, as follows:

"7. If the jury find, from the evidence, that defendant and deceased had a difficulty which resulted in the death of the deceased, and that defendant commenced the difficulty, or brought it on by any wilful and unlawful act of his committed at the time, or that he voluntarily, and of his own free will and inclination entered into the difficulty, then there is no self-defence in the case, and they should not acquit on that ground; and in such case it makes no difference how imminent the peril might have been in which the defendant was placed during the difficulty."

"9. If the jury believe from the evidence, beyond a reasonable doubt, that defendant killed deceased with a knife, which was a dangerous weapon, in a heat of passion, and without a design to kill him, they will find him guilty of manslaughter in the third degree, unless they further find from the evidence that such killing was done in self defence, in which event they will find him not guilty."

The tenth instruction simply declares the punishment for manslaughter in the third degree. Sec. 1251, R. S., 1879.

"12. The jury are instructed, that in considering what the defendant said after the fatal act, they must consider it all together. He is entitled to the benefit of what he said for himself, if true, as is the state to the benefit of what he said against himself in any conversation proved by the state. What he said against himself the law presumes to be true, because against himself. But what he said for himself the jury are not bound to believe, because said in a conversation proved by the state. They may believe it or disbelieve it, as it

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may be shown to be true or false, by the evidence in the case."

Instruction numbered three, asked by defendant and refused by the court, is as follows: "Although the jury may believe that defendant did stab and kill deceased at the time and place mentioned in the indictment, yet if they further find that at the time of stabbing, deceased was assaulting defendant with a club, block, or other weapon, apparently sufficient to inflict death, or real personal injury on defendant, that defendant was thereby inspired with fear of personal and immediate injury therefrom, then, and in that event, he had a right to use all necessary means at his command, to protect himself from the threatened injury, and if in so doing he killed deceased in order to protect himself from said threatened injury, then he was justifiable in so acting."

The seventh instruction has been sanctioned by this court in the following cases, and was not erroneous: *State v. Linney*, 52 Mo. 40; *State v. Underwood*, 57 Mo. 40; *State v. Brown*, 64 Mo. 367. The ninth gives a correct definition of manslaughter in the third degree (R. S., 1879, sec. 1244), which was proper under the evidence which shows the killing was done with a dangerous weapon, in a heat of passion, without a design to effect death, and that it was not justifiable or excusable. The twelfth instruction is sanctioned by this court in *State v. Talbott*, 73 Mo. 347; *State v. Curtis*, 70 Mo. 594. The third instruction asked by the defendant, and refused, was given in a more unobjectionable shape in the defendant's second instruction, and it was not error to refuse the third.

These are all the objections made by the defendant in his motion for a new trial, and upon the whole case there is no error for which the judgment below ought to be reversed. The defendant is under bond to abide the decision of this court on this appeal. The judgment is affirmed. All concur, except Henry, C. J., absent.

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THE STATE V. REED, *Appellant*.

1. **Criminal Law : FELONY : ACCESSORY AFTER THE FACT.** One who conceals or aids a felon, not in order that he may escape arrest, trial, conviction or punishment, but for some other purpose, cannot be convicted as an accessory after the fact under Revised Statutes, section 1650.
2. ———: **EVIDENCE.** On a trial under said statute for being an accessory after the fact in the larceny of a horse by one F., declarations of the latter that defendant participated in the stealing of another horse about the same time, and belonging to another person than the one from whom the first horse was stolen are inadmissible in evidence.

Appeal from Cass Circuit Court.—HON. N. M. GIVAN,
Judge.

REVERSED.

Wooldridge & Daniel for appellant.

(1) The indictment is insufficient. It does not follow the language of the statute. The latter does not intend to punish a concealment of the offender from motives of humanity or charity, or from any other motive or interest than that the offender "may escape or avoid arrest, trial, conviction or punishment." The indictment should have been in the language of the statute and charged that the acts complained of were done with no other motive or intent. Archbold's Pleading and Evidence (5 Am. Ed.) side page 692. (2) The evidence does not support the conviction. (3) There is no venue proven. Such proof is necessary either directly or by circumstances. *State v. McGinnis*, 76 Mo. 326; *State v. West*, 69 Mo. 404; *State v. Burns*, 48 Mo. 438; *State v. Miller*, 71 Mo. 89. (4) The court erred in admitting the confessions of defendant to Kyle. It does not appear they were voluntary, and the statements

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relative to taking Gentry's horse were irrelevant, and calculated and intended to prejudice the jury against defendant. *State v. Brockman*, 46 Mo. 566, 569; *State v. Simon*, 50 Mo. 370, 372; *State v. Hogan*, 54 Mo. 195; *State v. Jones*, 54 Mo. 478; *State v. Carlisle*, 57 Mo. 102; Wharton's Criminal Evidence, sec. 673; 1 Greenl. on Evidence (11 Ed.) sec. 219. The same authorities apply also to those statements made by defendant to witness, Ingram. (5) The second instruction for the state is wrong in that it assumes that "the mare in question" was stolen. *Merrett v. Given*, 34 Mo. 98, 147; *Peck v. Ritchey*, 66 Mo. 114; *Moffat v. Conkling*, 35 Mo. 453; *Chouquette v. Baradas*, 28 Mo. 491; *State v. Dillahunty*, 18 Mo. 331.

B. G. Boone, Attorney General, for the state.

(1) The indictment is sufficient. It is founded on section 1650, Revised Statutes. It clearly sets forth all the circumstances which constitute a definition of the offence, and the intent is charged with certainty and particularity. 1 Chit. Crim. Law, 281, 283; 1 Bish. Crim. Pro. (3 Ed.) sec. 632; *State v. Shiflett*, 20 Mo. 415; *State v. Coulter*, 46 Mo. 564; Revised Statutes, sec. 1821. (2) The evidence of E. C. Kyle, on behalf of the state, was properly admitted. It was not hearsay. The evidence in regard to collateral facts was a part of the main fact and directly connected with it. 1 Bish. Cr. Pro. (3 Ed.) sec. 1085; *State v. Earnest*, 70 Mo. 520; *State v. Underwood*, 75 Mo. 230; *State v. Emery*, 76 Mo. 347; *State v. Grant*, 79 Mo. 113. For the same reasons, the evidence of Thos. E. Gentry, for the state, was properly admitted. (3) The voluntary statements of the accused, while under arrest, were admissible in evidence against him. *State v. Shermer*, 55 Mo. 83; *Hawkins v. State*, 7 Mo. 190; *State v. Guy*, 69 Mo. 430. (4) The evidence presented a clear and complete chain of facts and circumstances to sustain the indictment. This was suffi-

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cient to warrant the conviction of defendant. *State v. Schoenwald*, 31 Mo. 147; *State v. West*, 69 Mo. 404. (5) The instructions given were proper declarations of the law applicable to the case.

HENRY, C. J.—The defendant was indicted in the Cass circuit court as accessory after the fact to a grand larceny charged to have been committed by one John D. Fredericks. A trial of the cause was had at the November term, 1884, of said court, which resulted in the conviction of defendant, and his punishment was assessed at two years' imprisonment in the penitentiary. The indictment is based upon section 1650, Revised Statutes, which reads as follows: "Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, who shall be convicted of having concealed any offender after the commission of any felony, or of having given to such offender any other aid, knowing that he has committed a felony, with the intent and in order that he may escape or avoid arrest, trial, conviction or punishment, and no other, shall be deemed an accessory after the fact."

The indictment charges the concealment, etc., with the intent, and in order that said Fredericks might make his escape, etc., but failed to negative any other intent. The words, "and no other," in the section relate to the intent, and not to the person who may be held guilty of the offence. The first part of the section declares that every person, except those standing in the relations specified, who shall do the act prohibited, shall be deemed guilty as accessories after the fact. That includes all persons except those standing in the relations specified, and the words, "and no other," have no relation to that portion of the section. Their place in the section and its completeness without those words as to the persons who may be deemed guilty of the offence, make it manifest that they relate to the intent. What

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is the meaning of the section holding those words to relate to the intent? Did the general assembly mean that if a person conceals a felon with a double intent, although both may be criminal intents, he cannot be convicted under this section? If he does the act with the guilty intent named, and also another intent equally criminal, does the existence of the latter intent cancel the criminal liability for the other guilty intent? If such is the meaning of the section, then it would be impossible ever to secure a conviction under it, for no one ever yet concealed or aided a felon to escape from justice who had but the single intent to aid him to escape. Such a construction makes the section absurd. What it means is, that no one shall be deemed guilty, under that section, who conceals or aids a felon, not in order that he may escape from justice, but for some other purpose. I concede that the meaning is not very happily expressed, but it is our duty to ascertain as best we may from the language employed, the legislative intent, and not to defeat it, because not as artistically expressed as it might have been. The indictment, if we have given the proper construction to the statement, is sufficient.

On the trial of the cause the state was permitted to prove by one Kyle, declarations by Fredericks of defendant's participation in the theft of a horse belonging to one Gentry, stolen about the time that Kyle's mare was stolen. This testimony should have been excluded. The defendant was indicted, not for stealing Gentry's horse, or as an accessory after the fact to that theft, but as an accessory after the fact to the stealing of Kyle's mare. There was no such intimate connection between the two crimes that in proving the one, the evidence necessarily tended to prove the other. Nor is there any resemblance between these crimes and that of counterfeiting and passing counterfeit money, and similar cases in which it is allowable to prove other criminal acts than those charged in the indictment. These are exceptional cases. But, even if evidence to prove the commission of

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another crime was admissible, certainly it is not to be proved by hearsay testimony. Here Kyle testifies that Fredericks made statements to him implicating defendant in the theft of Gentry's horse. The principle upon which the declarations of conspirators are admissible against each other when made in the prosecution of crime, has no application here. The declarations of co-conspirators against each other are not admissible after the objects of the conspiracy have been accomplished, but only while they are in the prosecution of the criminal enterprise. These principles are too familiar and too well settled to require the citation of authority announcing them, other than those found in our own reports. *State v. Duncan*, 64 Mo. 263; *Laytham v. Agnew*, 70 Mo. 48. The testimony of Gentry in relation to the stealing of his horse was also inadmissible on the ground first above stated in relation to the inadmissibility of Kyle's testimony.

The judgment is reversed and the cause remanded. All concur, except Sherwood, J., who dissents.

SWANK V. SWANK, *Executor, Appellant.*

1. **Practice:** BILL OF EXCEPTIONS: FILING OF. Leave given to present a bill of exceptions to the judge on or before a given date in vacation, which by agreement of parties is entered of record, clearly gives the right to file the bill within the given time.
2. ———: DISMISSAL OF APPEAL. Where the record fails to show that an appeal was allowed, the cause will be stricken from the docket of the supreme court.

Appeal from Mississippi Circuit Court.—HON. J. D. FOSTER, Judge.

APPEAL DISMISSED.

Field v. Stubblefield.

H. C. O' Bryan for appellant.

Smith & Krauthoff and *R. A. Hatcher* for respondent.

BLACK, J.—The judgment was rendered on the twelfth day of October, 1881, by the Mississippi circuit court, and leave was given to *present* bill of exceptions to the judge on or before the fifth day of the Scott circuit court. This was, by agreement of parties, entered of record and clearly enough gave defendant the right to file the bill within that time, which was done. Still it does not appear that any appeal was allowed by the court, and for this reason the cause must be stricken from the docket, and it is so ordered. Henry, C. J., absent. The other judges concur.

FIELD *et al.* v. STUBBLEFIELD, *Appellant.*

Fraud : ACTION UPON ACCOUNT : AGENCY : PARTNERSHIP : EVIDENCE. In an action upon an account for merchandise sold, where it is sought to connect the defendant with the purchaser of the goods by showing by circumstantial evidence that the latter acted as defendant's partner and general agent and clerk, and that he ordered other goods and signed defendant's name to notes, and managed mills and threshing machines for defendant, it is error to admit in evidence, to show that defendant bought the goods or ordered them to be bought for him, notes given by defendant to other parties, and notes made by other parties to strangers, and an interplea by defendant, claiming a threshing machine and its earnings, in a suit between the purchaser of the goods and a third party.

Appeal from Franklin Circuit Court.—HON. A. J. SEAY, Judge.

REVERSED.

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Crews & Booth for appellant.

Respondents' evidence showing that Wildfong was a general agent of appellant was irrelevant, because there was no evidence that the goods sold by respondents were purchased in the name of appellant or for him, or that they were received by or for him, or that in dealing with respondents Wildfong acted as agent. Had the court kept this evidence of agency from the jury, the jury could not have made the mistake of finding for respondents, or if they had, the court could not have made the mistake of allowing the verdict to stand.

W. L. Byersdorff for respondents.

There was evidence to support both the theory of appellant and respondents. The jury heard the evidence and found for respondents, and its verdict should be allowed to stand.

EWING, C.—This was a suit on an account for \$163.65 for the alleged sale by plaintiffs to the defendant of certain merchandise. The answer is a denial of every allegation in the petition.

This case must be reversed, on account of irrelevant and incompetent evidence admitted by the circuit court on behalf of the plaintiff. The only direct evidence in the case upon the question of the sale and purchase of the merchandise sued for, is: (1) That of James A. Field, one of the plaintiffs, who says: "I received some orders from J. D. Wildfong, Dundee, Franklin county, Missouri, for goods. The goods ordered were shipped in the regular way to J. D. Wildfong, at Dundee, Missouri. * * * The bill sued for is a true and correct bill of the amount J. D. Wildfong is owing to said firm. I know all from my own knowledge that the goods were shipped to J. D. Wildfong in the regular course of business. J. D. Wildfong at different times sent us

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letters promising to pay for the goods, but he failed to do so." (2) That of J. D. Wildfong, who said, in substance, that he ordered the goods for himself, and in his own name, and still owned them, and had given his note for them; that defendant had nothing to do with the purchase, and that witness, at the time, had no connection whatever with the defendant, and had never been in partnership with him, or invested in any firm in which defendant was concerned. (3) The evidence of the defendant, who denied having bought the goods, or ordered them, or authorized the witness, Wildfong, to order them; that he did not receive them, and did not own them.

The plaintiffs undertook to connect the witness, Wildfong, with defendant as a partner and general agent by circumstantial evidence, by showing that the witness acted as clerk in defendant's store, and ordered goods when needed, and signed the name of defendant to notes; and by running and managing mills and threshing machines at various times for defendant. The plaintiffs offered one Springate as a witness, and he was permitted to swear that he was present at a trial as to the ownership of a threshing machine, in which defendant testified he was the owner of the machine. The court permitted plaintiffs to read in evidence an interplea of defendant in an attachment suit before a justice of the peace in the case of *Herndon v. Wildfong*, in which he laid claim to certain moneys for threshing which had been garnisheed. Plaintiffs were permitted to read in evidence a note dated in 1876, made by Wildfong and Stubblefield & Company to the Washington Savings Bank. Also, two notes dated in 1875, in favor of Nichols, Shepard & Company, signed by Wildfong and William Bray and Richard Bray.

A very wide range is allowable in investigating questions of fraud, but these papers read in evidence in this case go beyond any legitimate inquiry, especially in a case in which appears such slight foundation for the

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claim, by any direct testimony. Notes given by Stubblefield & Company to other parties, and, indeed, notes made by other parties to strangers, and nothing whatever to connect them with defendant, are certainly not competent to be considered by a jury as to whether or not defendant bought the goods sued for, or ordered them to be bought for him; more especially when the plaintiff, himself, swears he sold the goods to another man, and shipped them in the regular course of business. The fact that defendant, in an interplea, claimed a threshing machine and claimed its earnings as his own, is not legitimate evidence to be considered by a jury, who are trying to ascertain whether or not defendant bought goods from plaintiffs, in the absence of any fact connecting the two transactions. The inquiry, we think, in this case, was permitted to extend too far, and facts were offered which in no wise tended to prove the issues.

The judgment below is reversed and the cause remanded. All concur, except Henry, C. J., absent.

JULIAN, Public Administrator, v. CALKINS et al., Appellants.

1. **Practice in Supreme Court: EVIDENCE: IMMATERIAL ERROR.** Although the testimony of the surviving party to a cause of action was improperly admitted in evidence, yet the Supreme Court will not, for that reason, reverse the judgment where the matters of such testimony were testified to by other witnesses and were not contradicted.
2. **Note Past Due: TITLE.** The transferee of a note past due takes only the title of his transferrer.
3. **Judgment, Assignee of: NOTE.** The assignee of a judgment of allowance in the probate court rendered on a note has the better title and, hence, the legal right to enforce payment as against one

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to whom the note was transferred after the rendition of the judgment.

Appeal from Greene Probate and Common Pleas Court.—HON. T. H. B. LAWRENCE, Judge.

AFFIRMED.

Jerre Cravens and *F. H. Heffernan* for appellants.

(1) The court below decided the case upon the theory that although Daniel Ellis acted in the purchase of the note upon the most reliable information and in the best of faith, yet, because he was the agent of the vendor he could not buy of the latter a doubtful claim, even though both parties knew all the facts relating to the same. This is not the law. *Grayson v. Weddle*, 63 Mo. 524; *Boehlest v. McBride*, 48 Mo. 505; *Kennedy v. Keaping*, 34 Mo. 25; *Mead v. McLaughlin*, 42 Mo. 198; *Woodlee v. Burch*, 43 Mo. 201. (2) The court erred in permitting Candace Calkins to testify in the cause. The cause of action in issue and on trial was the validity of the assignment from Walkley, or his mother-in-law, to Wirt W. Ellis, through the intervention of Daniel Ellis, and Wirt W. Ellis being dead, the other party, Candace Calkins, could not testify in her own favor.

W. C. Price for respondent.

(1) There is no such proceeding as this in the probate court, that court having no chancery jurisdiction, but statutory powers only. *Friedland v. Wilson*, 18 Mo. 380; *Presbyterian Church v. McElhaney*, 61 Mo. 540. (2) The proceeding is otherwise a nullity. The administrator is bound to pay respondent, being fully protected by the assignment of the order of allowance and assignment. Sections 2762 and 2763, chapter 42, Revised Statutes, 464; *Tutt v. Cowzner*, 50 Mo. 152; *Powers*

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v. Blakey, 16 Mo. 437. (3) No appeal lies directly from the probate court of Greene county to this court; and this cause must be dismissed for that reason. Section 29, Revised Statutes, chapter 1, article 14, p. 43. (4) The demand was equitably respondent's before assignment on the record by Walkley to her; and whilst it is true, perhaps, if without notice, W. W. Ellis had taken a legal transfer from Walkley, he would have held the legal right to payment as against Calkins, such is not the effect of the blank endorsement of instrument, especially under the circumstances of this case. Daniel Ellis, who negotiated the transaction for his son, colored Wirt W. Ellis' right.

DEARMOND, C.—On September 11, 1870, one H. J. Lindenbower executed to Candace Calkins his negotiable promissory note for \$1,000, payable in three months with ten per cent. interest. The note being assigned to S. T. Walkley was allowed by the probate and common pleas court of Greene county, against Lindenbower's estate, and the following minute of such allowance was endorsed upon it: "Allowed for \$1,041.70 in the fifth class of demands, this twenty-third day of February, 1871, E. D. Ott, clerk."

Credits were afterwards entered on the back of the note, five hundred dollars in April, 1871, and two hundred and fifty dollars, in August, 1872, and \$31.28 in November, 1874. In July or August, 1875, for one hundred and fifty dollars, paid by Wirt W. Ellis to his wife, Walkley endorsed on the note "pay to the order of ——. S. T. Walkley," and it was sent by mail to Ellis. In August, 1875, after this endorsement of the note Walkley executed a power of attorney to one Joseph Titus, "giving full power to my said attorney to assign said judgment for the benefit of Candace Calkins, who in reality is the owner thereof, as it was only assigned to me for collection." Titus, as attorney in fact, in November, 1875, assigned the judgment of

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allowance on the margin of the record to said Calkins, the assignment being attested by the clerk of said court. In 1879, Wirt W. Ellis died testate, and Daniel Ellis and John P. Ellis qualified as his executors. In July, 1881, S. H. Julian having in charge the Lindenbower estate, and having been ordered to pay fifth class demands in full, filed his petition in said court, calling attention to the rival claims of said Calkins, and Ellis and Ellis, executors, and praying the court that said parties be required to interplead, and that the court direct him as to the payment of the said allowance. The said parties came into court and set up their respective claims.

Upon the hearing the court found "that the claim in controversy, although allowed and classified in the name of S. T. Walkley in the fifth class of demands, was the property of the said Candace Calkins. That the said claim in the fall of 1874, was placed in the hands of Daniel Ellis, the father of Wirt W. Ellis, deceased, for collection, with instructions to apply the proceeds when collected to the payment of a deed of trust in favor of Joseph Titus and against said Candace Calkins. That afterwards, to-wit: in July or August, 1875, said Wirt W. Ellis purchased said claim from said Walkley through his father, and while the same was in his (Daniel Ellis') hands for collection with knowledge of the ownership of Mrs. Calkins, for which he paid to Mrs. S. T. Walkley, the sum of one hundred and fifty dollars." The evidence further shows that Daniel Ellis and Mrs. Walkley negotiated by letter the sale and purchase of the note, Daniel representing Wirt W. That Mrs. Calkins was in Kansas, Mrs. Walkley, in North Missouri, Mr. Walkley, in Illinois, and Daniel and Wirt W. Ellis, father and son, living together in Springfield at the time. That Mrs. Calkins knew nothing of the transaction until after the transfer had been made, and on learning of it was very much dissatisfied; that Walkley had nothing to do with it except to endorse the note in blank at the request of his wife and Daniel Ellis.

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That Mrs. Walkley and Mrs. Calkins, daughter and mother, used the one hundred and fifty dollars. That just after Mrs. Calkins came from Kansas and joined her daughter in North Missouri, a fresh correspondence began between Mrs. Walkley at one end of the line, and Daniel and Wirt Ellis at the other end, in which Mrs. Walkley charged that the Ellises had swindled her mother; there was no offer on the part of the Walkleys or of Mrs. Calkins to refund the one hundred and fifty dollars, nor was there any from the other side to surrender the note. The evidence does not show misrepresentation on the part of Daniel Ellis in his correspondence with Mrs. Walkley leading up to the purchase of the note for Wirt. Mrs. Calkins was eighty years old at the time of the trial in 1881. The court found that Lindenhower's administrator had \$667.64 to pay over on this allowance and directed him to pay to Ellis and Ellis, \$201.25, the amount of the one hundred and fifty dollars paid by Wirt Ellis with six per cent interest, and to Mrs. Calkins \$466.39, and adjudged that Ellis and Ellis, as executors, should pay two-thirds, and Calkins one-third of the costs of the proceeding. Ellis and Ellis appealed.

I. Ellis and Ellis objected to Mrs. Calkins' competency as a witness, on the authority of *Angell v. Hester*, 64 Mo. 144, and *Ring v. Jamison*, 66 Mo. 429. The objection, I think, should have been sustained. But Mrs. Calkins testified only about her ownership of the note, its assignment to Walkley for collection and that she kept it in her possession until her daughter went to place it in the hands of Daniel Ellis. All this was testified to by other witnesses, and no evidence in the case contradicted it.

II. In fact Walkley was only the agent of Mrs. Calkins, with no real title to the note or authority to transfer it. Hence, as was decided the present term in the carefully considered case of *Ford v. Philips*, 83 Mo. 523, Ellis acquired by the blank endorsement, re-

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garding the thing endorsed as a past due note merely, no greater interest or right than Walkley really had. But the note had been allowed as a demand against the Lindenbower estate and the clerk had minuted upon it its allowance and classification as the statute (R. S., sec. 211; G. S. 504, sec. 28) requires. Nor was it so changed by this certificate of the clerk that the rule governing unauthorized transfers by agents, seeming to be owners, of dishonored paper, does not apply. The allowance of this demand was upon the record of the court, and had, therefore, the force and effect of a judgment. R. S., sec. 192; G. S. 504, sec. 9; *McKinney's Adm'r v. Davis*, 6 Mo. 504; *Kennerly v. Shepley*, 15 Mo. 649; *Dullard v. Hardy*, 47 Mo. 404. If the note was not merged in this judgment, and I think it was not in the usual legal acceptance of the term, the judgment certainly was not merged in the clerk's minute on the note. There was, then, the note with the clerk's certificate of allowance and classification upon it, and the judgment of allowance. The note was under Walkley's hand endorsed in blank and delivered to Ellis. Afterwards the judgment was regularly assigned to Mrs. Calkins. The special facts aside, which would have the superior legal claim against the Lindenbower estate, Ellis or Calkins? Beyond question, a judgment, as against the person or thing within its reach, is superior to the demand upon which it was based. Mrs. Calkins, then, acquired by the assignment of the judgment to her the legal right to demand payment of the \$667.64.

III. It is not necessary to go into the question as to whether or not the lower court has or had any equity jurisdiction, or to cite former decisions on the point. Ellis and Ellis were not hurt, but benefited, by its assumption of such jurisdiction, and cannot complain that by its judgment they get \$201.25, instead of nothing.

IV. It is urged that Mrs. Calkins, having used a

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portion of the one hundred and fifty dollars, paid by Ellis to Mrs. Walkley, and never having offered to return it, is estopped from asserting any claim to the funds in the hands of Lindenbower's administrator. While a court of equity might require her to refund, it would not in effect do more than was done by the court below. As assignee of the judgment she has firmer legal footing than the holder of the note. Under all the evidence I do not find any estoppel in her way.

V. Since the instructions asked by Ellis and Ellis and refused were framed on the theory that the blank endorsement of the note by Walkley transferred to Ellis a higher legal claim than the subsequent assignment of the judgment carried to Mrs. Calkins, they require no further notice. I find no error to warrant a reversal, and having reached this conclusion there is no bitterness in the unbidden thought that our decision may soften the twilight of life for the matron whose years are four score and four.

The judgment should be affirmed. All concur.

THE SOUTHERN EXPRESS COMPANY, *Appellant*, v.
MOELLER *et al.*

1. **Express Company : AGENT : BOND.** Where an express company seeks to recover on the bond of its agent for its breach in receiving a package to be forwarded to its destination and which was not forwarded or accounted for, it must show that the defendant received the package as its agent.
2. **New Trial : NEWLY DISCOVERED EVIDENCE.** A motion for a new trial on the ground of newly discovered evidence, *held*, properly refused.

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Appeal from Mississippi Circuit Court.—HON. J. D.
FOSTER, Judge.

AFFIRMED.

H. C. O' Bryan for appellant.

The plaintiff was entitled to recover. *Ladere v. Griffith*, 25 N. Y. 364; *Blossom v. Griffin*, 13 N. Y. 569; *Wade v. Wheeler*, 47 N. Y. 658; *Michigan Railroad v. Schurz*, 7 Mich. 515; *Merriam v. Railroad*, 24 Conn. 354; *Ackley v. Staelin*, 56 Mo. 558. A new trial should have been granted because of newly discovered evidence. *State v. Ray*, 53 Mo. 345.

F. P. Wright and *Smith & Krauthoff* for respondent.

The plaintiff was not entitled to recover. *Condon v. Railroad*, 21 N. W. Reporter, 321. Nor was the plaintiff entitled to a new trial on the ground of newly discovered evidence. *State v. Ray*, 53 Mo. 345; *Cook v. Railroad*, 55 Mo. 380.

DEARMOND, C.—This is an action on a bond of M. D. Moeller, as principal, and J. H. Bethune and Mosser Ward, as sureties, to the Southern Express Company, conditioned for the faithful performance by Moeller of his duties as employe of said company. For alleged breach it is charged that said Moeller as agent of plaintiff received, to be forwarded to its destination, a sealed package addressed to D. A. Mitchell, Dexter, Missouri, containing four hundred dollars; that he never forwarded or accounted for the same, and his sureties have not accounted therefor, and plaintiff had been compelled to pay the amount thereof to said consignee, etc. The answer was a general denial. No declarations of law were given or asked; the trial was by the court upon the

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pleadings and bond and this agreed statement of facts: "It is agreed that the Southern Express Company is a corporation and common carrier as stated in the petition. That Moeller, Bethune and Ward executed the bond sued upon. That a package containing four hundred dollars was sent from Erin, Tennessee, by agent of Southern Express Company to D. M. Mitchell, Dexter, Missouri. That said package of four hundred dollars was conveyed by said Southern Express Company to Columbus, Kentucky, and then transferred to the Adams Express Company, to be forwarded to Charleston, Missouri, at which place it was delivered to M. D. Moeller, as agent of said Adams Express Company, who was also agent for the Southern Express Company at Charleston, Missouri. That M. D. Moeller, upon receipt of said package from the Adams messenger on the Belmont and St. Louis line, signed the book of said messenger for said package as agent of Adams Express Company. This is the last trace of said package. It was the duty of said Moeller, as agent of said Adams Express Company, to have entered the same on the record book of the Adams Express Company, which entry was never made. It was his duty as agent of the Southern Express Company to enter in the forwarding book of said Southern Express Company all packages received from the agent of the Adams Express Company, and also from all other parties. No entry was ever made in the forwarding book of said Southern Express Company of this package. It is further agreed that the four hundred dollars was not accounted for by said Moeller to either of said companies, and that the Southern Express Company long before the commencement of this suit paid said consignee, D. M. Mitchell, the said sum of four hundred dollars. It is further agreed that the Adams Express Company, in transporting said parcel of four hundred dollars to Charleston, Missouri, did carry and convey to its office nearest to destination, and that it was the duty of the agent of

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said Southern Express Company to forward, without notice, the said parcel to Dexter, Missouri, when delivered to him, and that said parcel was not forwarded. That said M. D. Moeller, as agent of Southern Express Company at Charleston, Missouri, was the only person to receive matter from the public offered for shipment to the Southern Express Company, and it was also his duty to receive from the Adams Express Company all matter offered by that company and destined to points in the territory of said Southern Express Company. That said M. D. Moeller was the only medium of transfer from the Adams Express Company to the Southern Express Company at Charleston. That Adams Express Company occupied the line of road between Columbus, Kentucky, and St. Louis, and that Southern Express Company occupied the road between Cairo and Poplar Bluff, on which Dexter, Missouri, is situated. That said Adams Express Company did transport and convey said parcel to Charleston, Missouri, and this was as far as said company could carry said parcel on its own routes or lines, and that Charleston, Missouri, was the nearest Adams Express Company's office to said destination, Dexter, Missouri."

The finding and judgment were for defendants and plaintiff appealed.

I. But one issue was raised by the pleadings and evidence: Did M. D. Moeller, *as agent of the Southern Express Company*, receive the four hundred dollar package addressed to D. A. Mitchell? The burden of proof rested upon plaintiff. The parties agreed that Moeller received the package "*as agent of Adams Express Company*," from the messenger on the Belmont & St. Louis line and "signed the book of said messenger for said package as agent of Adams' Express Company. * * * This is the last trace of said package." We know not whether these companies had different offices or occupied the same office. If different, we know not how far apart the offices were, nor at which the transfer should

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have been made. Nor do we know that the package ever reached any office, though the inference that it reached the Adam's office is a fair one. We only know that it went into the hands of Moeller, *as Adam's agent*, and "this is the last trace of said package." We must conclude with the trial court that plaintiff did not make a case.

II. By the affidavits filed in support of the motion for a new trial it appears that plaintiff had discovered, since the trial, that it could prove by its route agent, who signed for it the agreed statement of facts upon which the case was tried, and by its cashier and auditor, that, according to the custom and usage of express companies, Moeller had really received the money package for the plaintiff. Also, that the two companies had but one office in Charleston, and that was in a room in the railroad station, which they occupied together. And that Moeller was hired and paid by the two companies jointly. There is here no discovery. The plaintiff's officers merely disclosed in their affidavits what they knew before the trial, but did not deem of sufficient importance to submit to the court with, or as part of, the agreed facts of the case, or to mention to plaintiff's attorney. So, without stopping to consider whether plaintiff's case would really be materially strengthened by this additional evidence we need but say there was no error in the refusal to open the case to let it in on another trial. *State v. Ray*, 53 Mo. 345. The judgment should be affirmed. All concur.

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SUMMERS *et al.*, Appellants, v. AKERS *et al.*

Fraudulent Conveyance. The decree of the lower court refusing to set aside a conveyance of land as being in fraud of creditors, affirmed.

Appeal from Ray Circuit Court.—HON. G. W. DUNN,
Judge.

AFFIRMED.

Adam J. Barr and J. E. Black for appellants.

(1) The deed from Jasper N. Akers, one of defendants, to Hugh Akers will not be sustained to secure the payment of debt due said Hugh Akers from said Jasper N. Akers, for the sum of three hundred dollars, because said Hugh Akers was amply secured by a deed of trust upon the homestead of said Jasper N. Akers, which was afterwards sold for the sum of eight hundred dollars and said debt paid and lien released. *Murray v. Cason*, 15 Mo. 378; *Johnson v. Sullivan*, 23 Mo. 474; *Henderson v. Henderson*, 55 Mo. 534; *Boyd v. Jones*, 60 Mo. 454; *Ames v. Gilmore*, 59 Mo. 537. (2) The deed from Jasper N. Akers to Hugh Akers should be set aside because made in fraud of creditors. The creditor first proceeding to subject the property to sale for his debt is entitled to be first satisfied out of the proceeds of the sale. *George v. Williamson*, 29 Mo. 190. (3) If the effect of the deed is to hinder, delay or defraud creditors it should be set aside, although it was not so intended. *Potter v. McDowell*, 31 Mo. 62. (4) The intention on the part of Hugh Akers to convey the property in controversy to the children of Jasper N. Akers, would not cure the fraud, as it would be the act of Jasper N. Akers, and the law requires him to be just before he is generous. *Gamble v. Johnson*, 9 Mo. 605. (5) If Hugh Akers accepted the deed

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in controversy and the same was made in fraud of creditors for the purpose of assisting his co-defendant, Jasper N. Akers, in his fraudulent acts, although he paid full value for the property in controversy, he is a partaker in the fraud and the conveyance should be held null and void. *Potter v. Stevens*, 40 Mo. 229. (6) A deed, although for a full and sufficient consideration, if it has secret contradictory conditions preserved in a private contract, is void if for the purpose of hindering, delaying or defrauding creditors, and they raise the conclusive presumption that such was the intention unless rebutted by the clearest evidence and strongest proof—and the deed and private contract in this case is unquestionably subject to this presumption of fraud. *Sibley v. Hood*, 3 Mo. 290; *Irwin v. Wells*, 1 Mo. 9.

Shotwell & Ball for respondents.

(1) Plaintiffs being privies in estate with Jasper N. Akers, were estopped from proving fraud in the conveyance from J. N. Akers to Hugh Akers; and if there was any fraud in the transaction, J. N. Akers, being the guilty party, should not have been permitted to have testified as to the fact. *Baily v. Trustees*, 12 Mo. 174; *Clamorgan v. Green*, 32 Mo. 285; *Dickson v. Anderson*, 9 Mo. 156; *Lajoy v. Primm*, 3 Mo. 529; *Durett v. Briggs*, 47 Mo. 356; *Amy v. Ramey*, 4 Mo. 505; 1 Greenleaf on Evidence (13 Ed.) section 211. (2) Jasper N. Akers was estopped from denying the validity of the judgments against him before T. J. Dodd, J. P. (3) There was no fraud in the purchase of the land in controversy on the part of defendant, Hugh Akers. (4) If the deed from Jasper N. Akers to Hugh Akers is a mortgage, then the plaintiff cannot recover without repaying the amounts advanced by Hugh Akers to Jasper N. Akers, which the evidence shows to be the sum of \$1,535.63.

BLACK, J.—This is an actiton in two counts. By the

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first, the plaintiffs seek to set aside a certain deed as being fraudulent, and the second is in ejectment. The merits of the case depend upon the proper disposition of the equity branch, so that the other need not be considered. Jasper Akers, one of the defendants, owned two pieces of land, one is called the grocery property and the other the residence property. On the twentieth of November, 1875, by warranty deed he conveyed the grocery property to Hugh Akers for the expressed consideration of \$1,500. This is the deed claimed to be fraudulent. Contemporaneous with this deed the parties stipulated in writing that the deed should stand as a mortgage to secure a debt of three hundred dollars due from Jasper to Hugh, which was also secured by a deed of trust on the residence property, and to secure the payment of any other sum of money that might thereafter become due from the former to the latter. It was also agreed that the grocery property should be sold first, if it became necessary to sell either parcel to pay these debts.

Plaintiffs purchased the grocery property at a sheriff's sale made in March, 1877, upon two small judgments against Jasper Akers, recovered before a justice of the peace, the transcript of one of which was filed in the circuit clerk's office on the twenty-eighth of December, 1876, and the other in February, 1877. The deed of trust, before mentioned, was dated in April, 1875. In July of that year Jasper Akers made another deed of trust on this residence property to secure a debt to Remulius. In October, 1876, this residence property was sold by Jasper Akers, and the prior debt of three hundred dollars, due to Hugh, was then paid.

The deed in question, by reason of the contemporaneous agreement, must be regarded and treated as a mortgage. Inasmuch as the three hundred dollars were paid, it can have no continued validity, unless other advances were made by Hugh and they still remain unpaid. The evidence shows that Jasper Akers was engaged in the saloon business, and at the time of the execution of

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the deed in question, was embarrassed because of debts which he then owed. In his testimony, which was given in the interest of the plaintiffs, he states in substance that he owed Hugh nothing when the deed was made, and did not become indebted to him thereafter, and that this deed was made to keep his creditors from getting the property. He also claims that he and Hugh became partners in the saloon business; that certain judgments by him confessed in 1876, before a justice of the peace, were contrived to keep one Moore from seizing his personal property. The defendant, Hugh Akers, in substance, testified that Jasper owed him some four hundred dollars at the time the deed was made, in addition to the three hundred dollars, that he paid the state and county license for Jasper, and paid for him a number of accounts, a thousand dollars or more of which still remain unpaid to him. The confessed judgments before the justice of the peace, he says, were for these amounts, and he gives the amounts and persons to whom he made the payments. Jasper does not deny having owed these amounts, nor does he deny that Hugh paid them, though he says they were paid out of the partnership business. It appears that part of the grocery property was sold, and Jasper got some two hundred and sixty dollars of the proceeds. His statements on the witness stand are, to say the least, not satisfactory, and are at war with most of the written documents, and inconsistent with a letter written by him in 1878, in which he negatives the notion of any co-partnership, and asserts the then existing right of Hugh Akers to the property in question.

Without going into the testimony at any greater length, it is sufficient to say that the weight of the testimony supports the finding of the circuit court, and the judgment is affirmed. Henry, C. J., absent. The other judges concur.

Keithley v. Keithley.

KEITHLEY *et al.*, Appellants, v. KEITHLEY.

1. **Equity Practice.** Where a jury, empaneled to try an issue in an equity case, fails to agree, the court may refuse to call another jury, and may decide the case on the evidence it has already heard before the jury which disagreed.
2. ———. The court in an equity case is not bound to submit issues to a jury, or to accept as its own the finding of a jury.
3. **The Evidence** in this case held to support the finding of the lower court, that the defendant's grantor had sufficient mental capacity to make a conveyance of land to him.

Appeal from Ralls Circuit Court.—HON. THEO. BRACE,
Judge.

AFFIRMED.

W. H. Biggs for appellants.

(1) The court committed error in refusing either to submit to the jury, or itself to try the first, second and third issues, or either of them, as made by the pleadings. The first issue is certainly a material one. The defendant does not claim, and the deed itself negatives the idea that the conveyance was made as a gratuity. Courts of equity will not permit one to accept a conveyance for a consideration, and afterwards set it up as a gift. *Cadwalader v. West*, 48 Mo. 495. The trial court could not take the verdict of the jury upon a part of the issues, and then proceed to render judgment on the whole case without trying the remaining issues. *Leeper v. Lyons*, 68 Mo. 216. (2) The court erred in excluding the testimony of Dr. George E. Frazier. Dr. Reynolds had testified that Rowland Keithley was afflicted with epilepsy, and Dr. Frazier, who was a practicing physician of long standing, ought to have been permitted to testify as to the effect of the disease on the mind of a patient.

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An expert may be asked general questions as to the laws of mental disorder, or decay, for the purpose of enabling the jury to weigh and apply the testimony. *Abbot's Trial Ev.*, 117; *1 Greenl. Ev.*, sec. 440. (3) The court erred in withdrawing the fifth issue from the jury. The uncontradicted evidence of plaintiffs showed that a confidential relation existed between the defendant and his father, and that defendant had, by a long residence (interrupted for only about one year) with his father, acquired great influence over him, and hence the father was anxious for the defendant to come back to live with him. And the evidence in the case at least showed that the mind of the father had become greatly weakened and impaired by old age and disease. These facts being shown, the presumption that the deed in controversy was unfairly obtained, at once arises, and the burden is on the defendant to affirmatively show that the deed was executed fairly and freely by the father, and with a mind emancipated from the son's influence. *Cadwalader v. West*, *supra*; *Garvin v. Williams*, 44 Mo. 465; *Harvey v. Sullens*, 46 Mo. 147. (4) When weakness of mind is shown, and circumstances of undue influence by the other contracting party, a court of equity will interfere. *Tracy v. Sackett*, 1 Ohio St. 60; *Gartside v. Ishwood*, 1 Brown's Chan. R. 560; 1 Story's Eq., sec. 238; *Cruise v. Christopher's adm'r*, 5 Dana 181; *Whiteburn v. Heimes*, 1 Munford 557; *Buffalo v. Buffalo*, 2 Dev. & Bat. Chan. R. 241. When undue influence has once been acquired and operated on a party in the disposition of his property, it is not necessary to show that the undue influence was actually exerted at the time of the disposition of the property. *Taylor v. Wilburn*, 20 Mo. 306.

Redd & Harrison for respondent.

(1) While in an action at law the parties have the right to demand the trial of all the issues by a jury, no

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such right exists in a court of equity. 1 Story's Eq., secs. 31 and 190; *Dale v. Roosevelt*, 6 John. ch. 256; *LeGuin v. Gouverneur*, 1 Johns. Cases, 436; *Burt v. Rynex*, 48 Mo. 309; *Hickey v. Drake*, 47 Mo. 371. (2) There was no testimony tending to show that Rowland Keithley acted under duress. The *onus* of the issue was on plaintiff, and he failed to make out his case. Fraud will not be presumed in any case where the facts consist as well with honesty as with fraud. *State ex rel. v. Roberts*, 26 Mo. 533; *Henderson v. Henderson*, 55 Mo. 554; *Rumbold v. Parr*, 57 Mo. 592; *Ames v. Gilmore*, 59 Mo. 543. (3) The law presumes that every adult person is sane, and has the capacity to contract. This legal assumption is based on a fact of which every court will take judicial notice, viz.: that sanity is the normal condition of the human mind, insanity the abnormal. *Jackson v. Vandusen*, 5 John. 158; *White v. Wilson*, 13 Vesey, Jr., 88; *Jackson v. King*, 4 Cowen, 216; *Attorney General v. Paranthorpe*, 3 Bro. C. C. 443; 1 Jarman on Wills, 72 and 74; 2 Starkie on Evidence, 1276. *Non compos mentis*, in English, "not of sound mind," is a legal phrase, and imports a total deprivation of sense. *Jackson v. King*, 4 Cowen, 217; *Odell v. Buck*, 21 Wend. 143; *Stewart's exec'r v. Lispenard*, 26 Wend. 300; *The Barker Case*, 2 John. ch. 233; *Ex parte Cramer*, 12 Vesey, Jr., 450 to 452; *Burley's case*, 4 Coke 123. A person being of weak understanding, "provided he is neither an idiot nor a lunatic," is no objection in law to his disposing of his property. The law will not undertake to measure the understanding of a man. If he be legally *compos mentis*, be he *wise* or *unwise*, in contemplation of law, he is the disposer of his own property; his will stands as a legal and sufficient reason for his actions. Shepherd on Lunacy, 37; *Stewart v. Lispenard*, 26 Wend. 301. The fact that the mental faculties have been weakened or impaired by old age, disease, or other causes, in and of itself, affords no ground for impeach-

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ing a deed or will, provided the party be *compos mentis* in the legal import of the term.

DEARMOND, C.—Rowland Keithley owned three hundred and forty-two acres of land in Ralls county, worth about seven thousand dollars, and had some money, live stock, notes, and other personalty. In 1869 he made a will, in which he devised ten acres to his son, James T., and one hundred acres to another son, John C., and directed the general distribution, in a specified way, of the residue of his property, among his children and grandchildren. His children, of whom eight survived him, were all grown. One daughter had died, leaving two children. Some were very poor, especially a widowed daughter with a large family of girls. John C., the defendant, was married, but had no children. He had been a sufferer from asthma from his third year, and had remained with his father on the farm. In 1874 he moved off. His chief reason for going was his dissatisfaction because his father would not convey to him by deed a portion of the farm. He feared the will might be changed, or the one hundred acres otherwise disposed of, so that he would not get it. In January, 1876, after his store over in Illinois had been burned, he visited his father, then living alone at the old home, for the purpose, he says, of renting some land, but instead of offering to rent he proposed to move back and care for the old man, during the remainder of his life, if the latter would deed him two hundred acres. The father was willing to give him one hundred and fifty acres; and on a very cold day, the second after the son's arrival, January 21, 1876, they went together to New London, eight or ten miles distant, when and where was executed, acknowledged and recorded, the deed—a general warranty—to set aside which, the other children and heirs of Rowland Keithley, brought this suit. The one hundred and fifty acre tract conveyed was worth about four thousand dollars. The consideration ex-

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pressed is "the care and support of said Rowland Keithley, and ten dollars." John C. moved back and took possession of the one hundred and fifty acres, his father living with him until January, 1878, when the latter, then between eighty and eighty-seven years old, died.

It is charged in the petition that the deed was without consideration; that the consideration was grossly inadequate; that John C. obtained the deed by fraud and coercion; that Rowland Keithley was so weakened in mind from old age, habits of intemperance and disease that he was not capable of making a valid conveyance.

The court submitted these issues to a jury:

"1. Was the mind of Rowland Keithley so impaired by old age, disease, or otherwise, that he did not have sufficient capacity to make a contract?

"2. Was said deed procured from Rowland Keithley by duress, fraud, or undue influence exercised over him by the said John C. Keithley?"

This issue was withdrawn after all the evidence was in. It also appears from the record that at some time, apparently at the conclusion of the evidence, the court submitted this further issue:

"At the time of the execution of the deed from Rowland Keithley to John C. Keithley, was the mind of the said Rowland so weakened, or impaired, by old age, disease, or otherwise, that he did not have sufficient mental capacity to make said deed?"

Plaintiffs complain of the refusal to submit issues as to whether: (a) The deed was made for a valuable consideration from John C. to Rowland; (b) whether it was made upon an adequate consideration; (c) whether, at the time of executing the deed, Rowland was laboring under great mental weakness, induced by old age and diseases. James T. Keithley administered on his father's estate. The will, made in 1869, was admitted to probate, but in the proceeding it was found that

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Rowland Keithley had conveyed to James T. the ten acres devised to him, and had conveyed to John C. one hundred and fifty acres of other lands in lieu of the one hundred acres devised to him. And in establishing the will it was adjudged that the same should, except the clauses containing said two devises, be admitted to probate as the last will of the deceased.

More than two dozen witnesses were examined, the larger number for the defendant. It was shown that Rowland Keithley had had the epilepsy for thirty years. That the fits were generally brought on by excitement or anger. He had a fit while his son, John C., and he were alone at his house, the day before the deed to John C. was made. He was generally stupid for two or three days after a fit. It is in evidence that the disease tends to shatter the mind. Rowland Keithley was a very eccentric man. He was energetic and industrious, and well preserved for a man of his years. He always managed his own affairs, sold his grain and live stock, and collected and loaned his money. He was very obstinate, and generally had his own way. He was on friendly terms with all his children and grandchildren. He was strongly attached to John C. and John C.'s wife. He used liquor occasionally all his life, but there is no evidence of drunkenness, or injury from intemperance. He never showed any dissatisfaction with his act of deeding to John C. the one hundred and fifty acres of his farm, but seemed to be contented. Some of the witnesses thought his mind had been failing for a number of years, and that he was not able to comprehend the purpose and effect of the deed he made. Others regarded him as of sound and vigorous mind to the hour of his death, which was from pneumonia. The circuit clerk of Ralls county, who prepared the deed according to his direction, and took his acknowledgment, testifies that Rowland told him clearly how he wished the deed drawn, gave him the description of the land to be conveyed, and compared with him the description

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after the deed was written, and seemed to have a clear understanding of the whole matter. The jury disagreed, as a former one had done, and was discharged. The court refused to call another jury, as plaintiffs asked, but decided the issues on the evidence already heard. The finding was for defendant. The bill was dismissed and judgment was rendered against plaintiffs for costs, and they appealed.

I. There was no error in the refusal to submit to the jury the additional issues which plaintiffs asked to have submitted. They were fairly comprehended in the issues which the court did submit.

II. Nor was there error in the withdrawal of the second issue at the conclusion of the evidence, for there was no such issue on the evidence.

III. It was not error for the court to refuse to call another jury, or to decide the case on the evidence it, as well as the jury which disagreed, had heard. The court was not bound to submit any issues to a jury, or to accept, as its own, the finding of a jury. *Snell v. Harrison*, 83 Mo. 651, and authorities there cited.

IV. It only remains to be determined whether, under the evidence in the case, which we should consider, and have considered, the judgment ought to be sustained or overturned. There is no lack of evidence to uphold the judgment. It was for Rowland Keithley to determine how he should dispose of his property. I think he had the mind and understanding to do this, and did it to his own satisfaction. He was a remarkable man, full of eccentricities, but they did not interfere with his management of his own affairs. He lived in contentment for two years after he made the deed to John C., cultivated a crop each year, sold his stock and farm products, and finally died of acute pneumonia, as his physician testified. Many things are told of him, showing that he was peculiar, but not an imbecile; as to how obstinate he was; how he would sometimes speak to acquaintances, and at other times pass them without

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speaking; how he would become enraged upon slight provocation. He was sometimes despondent, and one of his daughters heard him threaten to commit suicide. A witness once heard him swear while trying to button his shirt collar; but it will not do to regard this as a symptom of softening of the brain.

I think the judgment should be affirmed. All concur, except Henry, C. J., absent.

LEEPER et al., Appellants, v. BATES.

1. **Equity Practice.** If in a suit in equity the complainant fails to make a case on the evidence, the chancellor may at once and without hearing any evidence, on defendant's behalf dismiss the bill.
2. **Semble** that a demurrer to the evidence can be interposed to the plaintiff's evidence in an equity case as well as in an action at law.
3. **The Demurrer** to the evidence in this action, which was one to set aside a deed for being in fraud of creditors, *held*, improperly sustained, because under the pleadings and the evidence, the defendant should have been required to furnish some proof of the honesty and good faith of the conveyance to him.

Appeal from Wayne Circuit Court.—HON. R. P.
OWEN, Judge.

REVERSED.

Smith & Krauthoff and C. D. Yancey for appellants.

(1) If a demurrer to the evidence is proper in a suit in equity, it must be tested by the same rule as in an action at law. See *Buesching v. Gas Light Co.*, 73 Mo. 219, as to this rule. (2) The evidence clearly shows an intention on the part of George Bates to defraud the creditors of Bates & Buehler. (3) The defendant and his

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grantor were brothers, and transactions between them are subject to a more jealous scrutiny than if they had occurred between strangers. (4) It was the duty of defendant to make strict and full proof of the consideration for and the fairness of the transaction. *Leavitt v. Laforce*, 71 Mo. 353. The presumption is always against the party who fails to make the explanation. *Cass Co. v. Green*, 66 Mo. 498; *Baldwin v. Whitcomb*, 71 Mo. 651; *Mabary v. McClurg*, 74 Mo. 575. (5) As the case stood, there was no evidence of a consideration paid by the defendant, and it must be taken as though the deed had been shown a voluntary one. This being true, and the grantor having been at the time of its execution insolvent (*Potter v. McDowell*, 31 Mo. 62, 73; *Eddy v. Baldwin*, 32 Mo. 369, 374), it is void as to creditors, without regard to whether there was any actual fraudulent intent on his part, or whether the grantee knew of it or not. *Patten v. Casey*, 57 Mo. 118; *Pawley v. Vogel*, 42 Mo. 291, 302; *Potter v. McDowell*, 31 Mo. 62, 69; *White v. McPheeters*, 75 Mo. 286, 294.

J. W. Emerson for respondent.

(1) The finding of the lower court is in accordance with the evidence. (2) Debtors can prefer one creditor to another. *Carson v. Murray*, 15 Mo. 381; *Shelby v. Boothe*, 73 Mo. 74. Nor can fraud be inferred from the mere fact that George Bates was largely in debt at the time of the sales. *State ex rel. Pierce v. Merrill*, 70 Mo. 284; *Dougherty v. Cooper*, 77 Mo. 527. (3) Fraud must be proved; it cannot be presumed. *Sibley v. Hood*, 3 Mo. 290; *Byrne v. Becker*, 42 Mo. 264; *Little v. Eddy*, 14 Mo. 160; *Dallon v. Renshaw*, 26 Mo. 533; *Rumbolds v. Parr*, 51 Mo. 592. (4) The declarations of George A. Bates were incompetent. No grantor or assignor can by his declarations, even in relation to the specific transaction, affect the rights of his grantee or assignee. 1 Greenleaf on Evidence, 180; 10 Mo. 174; 47 Mo. 293; 39 Mo. 93.

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DEARMOND, C. — Bates & Buehler (Geo. Bates and R. E. Buehler), merchants at Mill Spring, Wayne county, became indebted to A. F. Shapleigh & Company and to R. L. Wilkinson, and to others. Upon the dissolution of the firm, so Bates claimed, Buehler assumed and agreed to pay those debts; but Buehler afterward went through bankruptcy, leaving the debts unpaid. "Bates & Bro." and "Bates & Co.," two names for the firm composed of the brothers, George and Samuel A. Bates, succeeded Bates & Buehler. This firm and George Bates individually, became largely indebted. George had the management of the business, and Samuel, who was a doctor, was off at a medical school. George telegraphed to Samuel to return home immediately, which Samuel did, and on January 2, 1875, George transferred to him the store and book accounts and notes and some other property, the consideration being that Samuel should pay the debts of Bates & Bro. and Bates & Co., estimated at \$4,664.36. In August, 1875, George executed to Samuel a warranty deed to certain real estate for a consideration, as specified in the deed, of nine hundred dollars. Prior to this, in February, 1875, suits were begun in the Wayne circuit court upon the Shapleigh & Company and the Wilkinson demands. Judgments were rendered in these suits in April, 1876. Upon these judgments, which were against George Bates and R. E. Buehler, executions issued; the real estate conveyed by George to Samuel Bates in August, 1875, was levied on, and in October, 1876, sold; plaintiffs were the purchasers and received a sheriff's deed therefor. This action was brought to set aside the warranty deed to Samuel A. Bates, as being voluntary and made and accepted to defraud the creditors of Geo. Bates.

The evidence shows that George Bates dealt largely in lands as well as merchandise. He was resolved never to pay the debts of Bates & Buehler, claiming that he had once paid them in his settlement with Buehler; and he so expressed himself to a number of persons. He

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spoke of an intention to put his property out of his hands to avoid their payment, at the same time saying he meant to pay all his own honest debts. He talked of selling his property to pay his own debts. Before the sheriff's sale, an execution issued on another judgment against George Bates, had been returned *nulla bona*. No witnesses ever heard Samuel A. Bates say anything about the Buehler debts, and no one could say that Samuel was ever present when George talked about not paying these debts or about shifting his property. In September, 1875, George bought a lot for three hundred dollars from a Mrs. Bowen, paid her for it, and had the deed made to Samuel A. There was no evidence to show whether or not Samuel furnished the money to pay for the lot, or whether he knew of its purchase. There is no evidence of payment or failure to pay the consideration mentioned in the deed which plaintiffs attack as fraudulent. The recitals of the deed give us all the information we have on that subject. Nor is there any showing of the ability or inability of defendant to pay for this property. Defendant and his brother were present at the trial, but neither was called as a witness. At the conclusion of plaintiffs' evidence, which was voluminous, the court trying the cause, at the instance of defendant, sustained a demurrer to the evidence, and dismissed the bill.

Plaintiff appealed.

In equity proceedings, a demurrer to the evidence is, perhaps, novel. But if the petitioner makes no case, the chancellor need not call upon the other side for a showing; he may at once dismiss the bill. And sustaining a demurrer to the evidence may not, under our practice, be an objectionable method of doing this. But this appeal depends upon another question. Under the pleadings and the plaintiffs' evidence, should the defendant have been required to furnish some proof of the honesty and good faith of his purchase? George and Samuel Bates had been intimately associated in business. And, they were brothers. Upon Samuel, at the instance of

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his brother, devolved the duty and responsibility of winding up the affairs of the firm. Soon suits were brought on the Buehler debts. To strangers George expressed freely his determination never to pay these debts and his intention to put his property out of the reach of these creditors. How natural that the brother should hear of this. *Leavitt v. LaForce*, 71 Mo. 354. The petition charged *fraud* upon the defendant. His answer was a general denial, but he did not go into the witness box and thence face the accuser. Equity delights in a quick show of clean hands. These brothers alone knew the very heart of the transaction. Plaintiffs could only grope among the circumstances and incidents. "Fraud is rarely ever susceptible of positive proof, for the obvious reason that it does not cry aloud in the streets, nor proclaim its iniquitous purposes from the housetops. Its *vermiculations* are chiefly traceable by covered tracks and studious concealments." *Massey v. Young*, 73 Mo. 273.

Plaintiffs' evidence suggests the propriety of an explanation by the other party, who could tell the whole story. Such a suggestion of unheeded equity will swell into a demand. Then silence becomes pregnant with inferences. *Cass Co. v. Green*, 66 Mo. 512; *Baldwin v. Whitcomb*, 71 Mo. 658; *Mabary v. McClurg*, 74 Mo. 591. But we would not infer too much against this defendant, for the court thought there was no occasion for his testifying, and that may have been the only reason why he did not take the stand.

The talk of George Bates could not defeat the title of Samuel Bates, but what George said and did is pertinent as tending to show a fraudulent purpose in disposing of his property, and the facts of relationship and association in business may support the inference that Samuel was not ignorant of such purpose.

The court erred in dismissing the bill, and its judgment should be reversed and the cause remanded. Martin, C., not sitting. Ewing, C., concurs. Henry, C. J., absent.

Stepp v. The C., R. I. & Pac. Ry. Co.

STEPP V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Appellant*.

1. **Negligence : PROXIMATE CAUSE.** Negligence affords no ground for an action unless it is followed by an injury and is its proximate cause.
2. **Railroad : RATE OF SPEED.** While, in the absence of municipal regulations, no rate of speed of a railway train is negligence *per se*, still it does not follow that the railroad may at all times and places run its trains at any rate of speed.
3. ——— : ——— : **EVIDENCE.** In an action for the death of a person occurring at a public crossing in the country, and charged to have resulted from the negligence of defendant in managing its train, the rate of speed of the latter is a proper matter to be taken into consideration in determining whether the defendant was guilty of negligence at the crossing, and this, too, is the case irrespective of any rules of defendant relating to the rate of speed at such crossing.
4. **Public Crossings : RAILROADS : RATE OF SPEED.** There must be a reasonable and fair regard on the part of railroads for persons and property in running their trains through villages and over frequented public crossings, and the rate of speed must be made to conform reasonably with the surroundings.
5. ——— : ——— : **DUTY OF TRAVELER.** While it is negligence on the part of the railroad not to give the statutory signals at public crossings, it is, also, the duty of the traveler to use all reasonable care and caution to avoid injury.
6. ——— : ——— : ———. Such traveler has the right to believe the signals will be given, and on the other hand the company has the right to act upon the supposition that he will take all reasonable care to hear them and give heed to their warning.
7. ——— : ——— : ———. It is the duty of one crossing a railroad track to look and listen for an approaching train and thereby obtain all the information his eyes and ears will afford him, and if he fails to do so and thereby contributes to the injury, he must suffer the consequences, even though the railroad may have been derelict in the performance of its duty in giving the signals.
8. ——— : ——— : ———. If the crossing is obstructed from view, increased caution is required on the part of the traveler as well as on the part of the railroad, and if from noise, such as a gale of

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wind or the rattling of a wagon, hearing is rendered difficult, it then becomes the duty of the traveler to stop and listen.

9. **Negligence: ONUS PROBANDI.** It devolves on the person alleging the default of the company to make proof of its negligence and that the injury was occasioned in consequence of such negligence, and on the other hand when the fault of the person injured, if any there was, is not disclosed by the plaintiff's evidence and the railroad is shown to have been in default, it then devolves on the latter to show the want of proper care by the person injured, and that by the exercise of proper precautions he would have escaped injury.
10. ——— : ———. Direct evidence of the want of exercise of due care on the part of the person injured is not required to be produced. Surrounding circumstances may afford as conclusive proof as such direct evidence.

Appeal from Clay Circuit Court.—HON G. W. DUNN,
Judge.

REVERSED.

M. A. Low for appellant.

(1) The lower court erred in refusing to strike out the specifications of negligence in the petition, numbered two, three, four, five and six. (2) The court erred in striking out part of defendant's answer. (3) The court erred in admitting the testimony of W. R. Woodward that, under an observance of rule thirty-six, a passenger train going west would lose, in approaching Minnaville, about two or three minutes. *Telfer v. Railroad*, 30 N. J. L. 188; *Grows v. Railroad*, 67 Maine 100; *Kelly v. Railroad*, 75 Mo. 138; *Moody v. Railroad*, 68 Mo. 470. (4) The seventh instruction asked by defendant should have been given. *McConkey v. Railroad*, 40 Ia. 205; *Wallace v. Railroad*, 74 Mo. 595; *Powell v. Railroad*, 75 Mo. 82. So the eighth instruction as asked by defendant should have been given. *Moody v. Railroad*, 68 Mo. 472. (5) The fifth instruction asked by defendant should have been given. *Maher v. Railroad*, 64 Mo. 267; *Fletcher v. Railroad*, 64 Mo. 484; *Harlan v. Railroad*, 64 Mo. 480; *Moody v. Railroad*, 68 Mo.

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470; *Zimmerman v. Railroad*, 71 Mo. 636; *Purl v. Railroad*, 72 Mo. 168; *Kelley v. Railroad*, 75 Mo. 138; *Lenix v. Railroad*, 76 Mo. 86. Defendant's fourth instruction should have been given as asked. *Yarnall v. Railroad*, 75 Mo. 575. (6) The jury should have been instructed to return a verdict for defendant. *Artz v. Railroad*, 34 Ia. 153; Wharton on Negligence, secs. 382 and 384; *Railroad v. Elliott*, 28 Ohio St. 355; *Payne v. Railroad*, 39 Ia. 326; 52 Miss. 808; 75 N. Y. 330; *Sullivan v. Chrysolite, etc., Co.*, 21 Fed. Rep. 829; *Hinckley v. Railroad Co.*, 120 Mass. 257; *T. H. & I. R. Co. v. Clark*, 73 Ind. 168; *Haas v. Railroad*, 47 Mich. 401.

D. C. Allen for respondent.

(1) In the absence of proof of the exact facts at the moment of death the law indulges in the presumption that the deceased was in the exercise of due care. *Buesching v. Gas Light Co.*, 73 Mo. 219; *Louisville, etc., Ry. v. Goetz*, 12* Reporter, 50; Sherman & Redfield on Negligence, sec. 44; *Flynn v. Railroad*, 78 Mo. 195. (2) A breach of the science of managing trains by the railway employes is *prima facie* evidence of negligence. *P. W. & B. Railroad v. Derby*, 14 How. 468. (3) The circuit court committed no error in refusing instructions asked by defendant.

BLACK, J.—Plaintiff's husband was run over and killed on the sixth of September, 1881, by one of defendant's passenger trains at the crossing of a public road at Minnaville in Clay county. She brings this suit to recover \$5,000, and bases her right to recover in part upon the failure of the defendant to ring the bell or sound a whistle at the crossing. The train in question was not scheduled to, nor did it stop at, that place. Its regular time was twenty-four minutes past nine o'clock in the afternoon. On this occasion it was half an hour late.

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The surroundings were such that a train going west, as this was, would first pass the whole length of a side track, then the depot, and next the crossing in question, which was one hundred and seventy-five feet west from the west end of the platform of the depot.

1. The petition, among other things, sets up at length in the second, third and fourth specifications of negligence, that the engineer, when approaching the station, neglected to shut off steam so as to enable a brakeman to stop the train without sliding the wheels; that he neglected to direct his eyes to the switch, as soon as in view, and failed to have the train under control so as to be able to stop if the switch proved to be wrong, and that the crossing was a hazardous place, and the train was not under control, so as to prevent running over before stopping. The fifth specification alleges that the train was running at a rate of speed in excess of one mile in two minutes, and at the rate of forty miles per hour. The defendant moved to strike out that portion of the petition, including all of these and the sixth specification, which was overruled.

As applicable to these matters the plaintiff read in evidence, against the objections of the defendant, certain rules, which it appears were for the guidance of the defendant's employees. They are as follows:

"No. 1. Engineers will shut off steam, when approaching a station, in season to enable a brakeman to stop the train without sliding the wheels. When approaching a switch they will direct their eyes to it as soon as within view, and have their trains under such command as to be able to stop them, should the switch prove to be wrong."

"No. 2. The brakes must not be relied upon when approaching railroad crossings or other hazardous points; but steam must be shut off, and the train held under such control, as surely to prevent running over crossings before stopping."

"No. 3. The maximum rate of speed for the pas-

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passenger trains is one mile in two minutes, and for all other trains, one mile in four minutes. Faster running is prohibited, except from special order from the superintendent in each case."

"No. 4. Express passenger trains, having the right to pass stations without stopping, will reduce their speed so as to pass carefully the first switch."

The fact that the company was guilty of negligence, followed by an injury, does not make it liable, unless the injury was occasioned by that negligent act. *Harlan v. St. L., K. C. & N. Ry. Co.*, 65 Mo. 22. And such negligence must be the proximate cause of the injury. 1 Rorer on Railroads, 528. There must be a connection between the negligent act and the injury inflicted. *Powell v. The Missouri Pacific Railway Company*, 76 Mo. 80. The first part of the first rule has no application to this train, for it did not, nor did it intend to stop at the station at Minnaville, and the second part of the same rule is equally foreign to anything connected with the injury, and the same may be said of the fourth. The second rule has no application whatever to a public road crossing and by its own plain terms is applicable alone to railroad crossings. As to the third it was not shown, nor was it proposed to be shown that no special order was given by the superintendent to run faster than one mile in two minutes. It may be true the engineer did not have his eyes upon the first switch; that the speed of the train was not so reduced as to pass it carefully, and that if these things had been done there would have been a delay of a few minutes, as is contended, and the deceased would have passed over the track unhurt. But we do not see what direct connection all this has with the injury complained of. If a disobedience of some of these rules at some other station caused the delay of a half hour, that would not lay a foundation for recovery in this case. These rules and the instructions based upon them could have no other effect than to divert the minds of the jurors from the real issue. In-

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structions one and two, given at the instance of plaintiff, should have been refused, the rules should have been excluded, and the motion to strike out part of the petition should have been sustained as to the second, third and fourth specifications of negligence.

While in the absence of municipal regulations no rate of speed is negligence *per se* (*Powell v. Railroad*, 76 Mo. 82; *Bell v. Railroad*, 72 Mo. 50; *Wallace v. Railroad*, 74 Mo. 594) still it does not follow that the defendant may at all times and places run its trains at any rate of speed. This was a proper element to be taken into consideration in determining whether the defendant was guilty of negligence at the crossing, and this, too, without regard to the rules of the defendant. There must be a reasonable and fair regard for persons and property in running through villages and over frequented public crossings, and the rate of speed must be made to conform reasonably with the surroundings. *Pryor v. Railroad Co.*, 69 Mo. 215. The defendant's seventh instruction was properly refused.

2. There was evidence tending to show that the train was running at a faster speed than usual; that the bell was not rung nor the whistle sounded; that there were some trees west of the crossing, and for three-fourths of a mile one could not see along the track; that deceased was coming from the west, towards the crossing, and the train was approaching the crossing from the east; there were piles of lumber, wood, a saw mill and the depot, so that the train could not be seen until within a few feet of the crossing; no one saw the plaintiff's husband at the time he was killed; he lived in the neighborhood, and was going home with a team and loaded wagon. There was no direct evidence tending to show that he did or did not listen for a train, or that he stopped his team before attempting to cross the track. Three witnesses heard the train when coming; one who was in a favorable position heard it cross a bridge when a mile

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off, another when a quarter of a mile off, and a third did not hear it until it was within thirty yards of the station. It was a still, moonlight night.

Railroad companies cannot operate their roads, and thereby subserve the public interest, without crossing streets and public highways, and positive law gives them a right so to do, but they are required to give the statutory signal. It is negligence not to give the signal. The safety of human lives and of property, on and off the trains, demands the observance of these requirements as well as reasonable precautions in approaching these crossings. On the other hand, the public have a right also to use these highways at such crossings. It is also the duty of a traveler on the public road to use all reasonable care and caution to avoid injury. He has a right to believe these signals will be given, and on the other hand the company has the right to act upon the supposition that he will take all reasonable care to hear them, and give heed to their warning. It has been repeatedly held by this court that it is the duty of one crossing a railroad track to look and listen for an approaching train, and thus get all the information his eyes and ears will afford him, and if he fails to do this and thereby contributes to the injury, he must suffer the consequences, even though the company may have been derelict in the performance of its duty in giving the signals. *Fletcher v. The Atlantic & Pacific Railroad Co.*, 64 Mo. 484; *Harlan v. St. Louis, Kansas City & Northern Railroad Co.*, 64 Mo. 480; *Purl v. The St. Louis, Kansas City & Northern Ry. Co.*, 72 Mo. 168.

If the crossing is obstructed from view increased caution is required on the part of the traveler as well as the company, and if, from noise, such as a gale of wind or the rattling of a wagon, hearing is rendered difficult, then it would become the duty of the traveler to stop and listen. It devolves upon those who allege

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the default of the company to make proof of its negligence, and that the injury was occasioned in consequence of such negligence; and on the other hand, when the traveler's fault, if any there was, is not disclosed by his own testimony, and the company is shown to have been in default, it devolves upon the defendant to show the want of proper care on the part of the person injured, and that, by the observance of such precautions, as have been indicated, he could have seen or heard the train. *Johnson v. The Chicago, Rock Island & Pacific Ry. Co.*, 77 Mo. 547. But it is not required that direct evidence of a failure to look and listen, or to stop and listen when there are circumstances calling for such increased care should be produced. The surrounding circumstances are often as conclusive proof as direct evidence. Applying these principles to this case, there was evidence upon which the court was required to submit the cause to the jury, and the demurrer was properly denied.

The defendant's fourth instruction assumes in drawing a conclusion that the deceased failed to look and listen, and for this reason it was properly refused. With this correction, it should be given. It is unnecessary to go through the instructions in detail. Enough has been said to furnish a guide should the evidence be the same on a new trial. The motion to strike out a part of the defendant's answer should have been overruled.

Judgment reversed and cause remanded. Henry, C. J., absent. The other judges concur.

Moody v. Deutsch.

MOODY *et al.*, *Plaintiffs in Error*, v. DEUTSCH *et al.*

1. **Pleading: MALICIOUS ATTACHMENT.** A petition in an action for suing out a malicious attachment must allege the want of probable cause for the attachment.
2. **Question for Jury.** Where there is any evidence tending to prove the allegations of the petition, the case should not be taken from the jury.
3. **Malicious Prosecution, Action for: MALICE.** Malice is a necessary element in an action for malicious prosecution, and the sufficiency of the proof of such malice is a question for the jury.
4. ———: ———: **PROBABLE CAUSE.** What is probable cause for an attachment is a mixed question of law and fact. When the facts are undisputed, the court should declare their legal effect, but when they are disputed, the question is, under proper instructions, for the jury.
5. **Pleading: WAIVER.** A plea in abatement is waived by one to the merits.
6. The judgment of the trial court in this case held sufficiently formal.

Error to Johnson Circuit Court.—HON. N. M. GIVAN,
Judge.

REVERSED.

S. P. Sparks for plaintiffs in error.

(1) The court erred in instructing the jury that upon the evidence plaintiffs could not recover. It is held to be error so to instruct where there is a *scintilla* of testimony. There was testimony tending to establish a want of probable cause, as well as a bad and malicious motive, in suing out and prosecuting the attachment. *Alexander v. Harrison*, 38 Mo. 266; *Routson v. R. R.*, 45 Mo. 236; *Hays v. Bell*, 16 Mo. 496; *Emerson v. Sturgeon*, 18 Mo. 170; *Rippey v. Freide*, 26 Mo. 523; *Bowen v. Lazerle*, 44 Mo. 383; *McFarland v. Bellows*,

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49 Mo. 311. **The** evidence tended strongly to show that Deutsch's motive in suing out the attachment was to destroy plaintiffs' business, and for this an action would lie. Drake on Attachment, sec. 733. The testimony was uncontradicted that plaintiffs only owed defendant, Deutsch, one hundred and forty-eight or one hundred and fifty dollars, and that the amount had been tendered to his attorney the evening before the attachment. The attachment was for the sum of three hundred and eighteen dollars, and goods to the value of seven hundred dollars were seized. In such cases an action will lie in favor of the injured party. *Alexander v. Harrison*, 38 Mo. 258; *Cooley on Torts*, 189; *Sommer v. Hith*, 4 S. & R. 19; *Churchill v. Siggers*, 3 El. & Bl. 929; *Holliday v. Sterling*, 62 Mo. 321; Drake on Attach., sec. 733 (Ed. 1878). An abuse of the process of law is evidence of malice and want of probable cause. *Prough v. Entriken*, 11 Pa. St. 81; *Page v. Cushing*, 38 Me. 523; *Gallaway v. Burr*, 32 Mich. 335; *Seeber v. Price*, 26 Mich. 518. (2) In suit for malicious attachment, malice need not be expressly proved, but may be inferred from want of probable cause, and notwithstanding proof of probable cause, if, from bad or malicious motives, oppressive and vexatious litigation is carried on, the action for damages will lie. *Walser v. Thies*, 56 Mo. 89; *Sharpe v. Johnson*, 76 Mo. 660. (3) Although the affidavit for the attachment was made by defendant's attorney, his appeal from the action of the court, quashing the writ to the Supreme Court, was evidence of his assent to the act. *Perrin v. Claflin*, 11 Mo. 13; *Canifax v. Chapman*, 7 Mo. 175; *Page v. Freeman*, 19 Mo. 421. The defendant, Loebenstein, by signing the attachment bond, became equally liable with defendant, Deutsch. *Wetzel v. Walters*, 18 Mo. 396. (4) In actions for malicious attachment, the injury to plaintiff's business, and counsel fees, are proper elements of damage. Drake on Attachments, sec. 745; 2 Greenleaf on Evidence, sec.

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456; *Walser v. Thies*, *supra*; 3 Sutherland on Damages, 705.

O. L. Houts and *S. T. White* for defendants in error.

(1) The petition does not state that there was no probable cause for issuing the attachment, and hence set out no cause of action. Want of probable cause is the gist of the action. 2 Addison on Torts (Wood's Ed.) sec. 859, *et seq.* (2) There was no lawful jurisdiction over Deutsch, since there was no proof that Loebenstein was connected with Deutsch, or his attorneys, in issuing the attachment, further than becoming bondsman, and Deutsch was served with process beyond the jurisdiction of the court. *Fithian v. Monk*, 43 Mo. 502; *Latimer v. Ry.*, 11 Mo. 105; *Capital Bk. v. Knox*, 47 Mo. 333; *Brandenburger v. Easley*, 78 Mo. 659; *Graham v. Ringo*, 67 Mo. 324. (3) There was no evidence tending to show that there was either malice or want of probable cause in issuing the attachment. The evidence shows that Deutsch had nothing to do with it, and entrusted the whole matter to the discretion of his attorney, who made the affidavit for him, and caused the writ to issue. The fraudulent mortgage on the stock of goods admitted by plaintiff, clearly came within the statute providing for attachments. R. S. 1879, sec. 398, subdivision 7. It was simply a question of law whether an attachment would issue against a married woman's separate estate. This court had not passed upon this question, but the court of appeals had decided in its favor. *Frank v. Siegel*, 9 Mo. App. 467. While the trial court decided against the court of appeals, that authority gave the attorney a reasonable belief that it would sustain the attachment. (4) Advice of counsel protects Deutsch against liability. In this case the attorney made whole investigation and acted upon his own judgment. *Alexander v. Harrison*, 38 Mo. 258, and authorities cited. Also plaintiff's

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authorities. (5) There is no judgment in the lower court which is the subject of review in this court. *Bogges v. Cox*, 48 Mo. 278. In case cited, the form of judgment is almost in the exact words as the one at bar, and this court held that it was not a final judgment, and review of it could not be had in this court.

EWING, C.—This is a suit for damages against the defendants for malicious attachment of the property of the plaintiff, Nancy I. Moody. The petition alleges that the defendant, Deutsch, unlawfully and maliciously caused a writ of attachment to be issued and levied upon said Nancy Moody's property, which, upon appeal to this court, was dismissed; that by reason of the attachment plaintiff is damaged, etc.

The answer of Loebenstein was a general denial. That of Deutsch was as follows: "Now comes the defendant, Louis Deutsch, and for plea to the jurisdiction and to the merits, by way of answer, states that this court has no jurisdiction over his person in this action, and this action should abate, because the facts are that plaintiffs are residents of Johnson county, Missouri, and that this defendant is a resident of Pettis county, Missouri, and that the writ was served in this case upon him, summoning him into this court, in this cause, in the county of Pettis, state of Missouri. Defendant further alleges that his co-defendant, B. Loebenstein, was joined with him in this action, fraudulently and wrongfully, and for the sole purpose of annoying this defendant by obtaining service upon the said Loebenstein, in Johnson county, Missouri, and thus giving a show and appearance of jurisdiction to this court, whereas, in truth and in fact, these plaintiffs have no cause of action against said B. Loebenstein, jointly, with this defendant, or any cause why they should be jointly charged. Defendant says this action should abate as to him. Because of these facts, said defendant further answering, denies each and every allegation set out in plaintiffs' petition."

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The evidence was, in substance, that Mrs. Moody was in the liquor and grocery business in Warrensburg; that in September, 1880, the sheriff attached her stock of goods on a writ issued in the case of Deutsch against her; that the value of the goods served was one thousand dollars; that the debt sued for was three hundred and eighteen dollars; that Mrs. Moody's son, who was acting as her agent, told Deutsch's attorney, before the goods were seized, that his mother only owed one hundred and forty-eight or one hundred and fifty dollars, and offered to pay that; that he told the sheriff not to move the liquors until he could put the barrels in proper condition; that the bung holes were open and the liquor leaking; that the sheriff would not heed him, but threatened to arrest him; that her credit was good before the attachment, but it was not afterwards, and that it broke her up and she quit the business; that she got back a part of the goods the next summer in a wasted and damaged condition, after Mr. Deutsch had dismissed his attachment suit. There was also evidence showing the commencement and proceedings in the attachment suit, which was appealed to this court, and on motion here dismissed.

Upon the close of the evidence, the court below, at the instance of the defendant, gave the following instruction:

"The court instructs the jury that there is no evidence upon which plaintiffs can recover in this action."

The plaintiff then took a non-suit with leave to move to set it aside, which motion, being overruled, the case comes here on a writ of error.

I. The defendant insists that the petition is defective and does not state a cause of action, because it does not allege there was no probable cause for suing out the attachment. An action may be maintained for the malicious institution of a civil suit by attachment if the suit is commenced maliciously, and without probable cause, and shall terminate before the commencement of

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the action for damages. *Sharpe v. Johnston*, 76 Mo. 660; Cooley on Torts, 187, and authorities cited in note 5; Drake on Attachments, sec. 726. It is held everywhere to be necessary to aver want of reasonable or probable cause. *Dimmack v. Bowley*, 26 L. J. (C. P. N. S.) 231; Cooley on Torts, 180, 181; 2 Chitty Pl. 550. "The absence of reasonable or probable cause must be alleged." In *Given v. Webb*, 30 N. Y. (7 Rob.) 65, the action was for malicious prosecution; a demurrer to the complaint "in that it omits to aver that the prosecutions were without probable cause." The court say: "I understand the law to be well settled that, in order to maintain an action for malicious prosecution, the plaintiff must, in addition to other matters, establish a want of probable cause (5 Duer, 304), and it is equally well settled that every fact which the plaintiff must prove, to enable him to maintain his action, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated in the complaint. It follows from these principles that the averment of want of probable cause is a necessary allegation to be contained in a complaint for malicious prosecution." In that case the petition contained this averment: "Maliciously intending to injure the plaintiff, caused to be made a false and malicious affidavit;" and it was insisted that that included an averment of want of probable cause. But it was held that, "although malice be well and sufficiently proven, yet that does not establish want of probable cause." 2 Denio, 617; 3 Wash. C. C. 32.

The allegations in the petition in the case under consideration were to this effect: "Did wilfully, unlawfully and maliciously cause a writ of attachment to issue, * * * and that said defendant had no right or cause to sue out said writ, * * * or cause the levy or seizure of said goods, * * * but that the issuance and levy of said writ * * * was procured and caused with the wrongful and malicious purpose and intent on the part of said defendants to * * * injure and

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damage plaintiffs." In *Dennehey v. Woodsum*, 100 Mass. 195, it is said: "Absence of probable cause for the criminal charge is essential for the maintenance of an action for malicious prosecution. It must be made distinctly to appear by the averments of the declaration." This same doctrine is maintained in many of the states. Drake on Attachments, sec. 732. In the light of these authorities, we hold the petition in this case defective.

II. The doctrine is too well settled in this state for argument, that if there is any evidence tending to prove the allegations of the petition, it is error to take the case from the jury. *Alexander v. Harrison*, 38 Mo. 266; *Routson v. P. Ry.*, 45 Mo. 236; *Hays v. Bell*, 16 Mo. 496; *Emerson v. Sturgeon*, 18 Mo. 170; *McFarland v. Bellows*, 49 Mo. 311; *Smith v. Hutchinson*, 83 Mo. 683.

III. Taking all the evidence in the case, we are of opinion the questions ought to have been submitted to the jury. It is said that suing out an attachment for an amount greatly in excess of the debt is, at least, a circumstance tending to show a cause for which an action will lie. Cooley on Torts, 189; *Savage v. Brewer*, 16 Pick. 453. Malice is one of the necessary elements to make out a case for malicious prosecution, and what proof is sufficient to establish malice is a question for the jury. *Holliday v. Sterling*, 62 Mo. 321. "What is probable cause is a mixed question of law and fact. When the facts are undisputed, the court should declare their legal effect; but when disputed, the question is, under proper instructions, for the jury." 59 Mo. 557; *Sharpe v. Johnston*, 76 Mo. 660.

IV. It is insisted by the defendants in error that there was no lawful jurisdiction over Deutsch, since there was no proof that Loebenstein was connected with Deutsch, or his attorneys, further than becoming bondsman, and Deutsch was served with process beyond the jurisdiction of the court. It appears that the defendant, Loebenstein, was the surety of Deutsch in his attachment bond; that he resided in Johnson county when

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this suit was commenced, and process served on him, and then sent to Pettis county, where Deutsch resided, and served on him there. Deutsch answered, as it will be seen, and pleaded abatement as to himself, and also to the merits, by denying "each and every allegation set out in plaintiffs' petition." In *Fordyce v. Hathorn*, 57 Mo. 120, it is said: "Where matters in abatement and bar are contained in the same answer, the matter in abatement is waived by the defences in bar."

In *Ripstein v. St. Louis Mutual Life Insurance Company*, 57 Mo. 86, it is said: "An appearance to the merits and the setting up of a defence in bar to the action waives a plea to the jurisdiction."

V. It is insisted by defendant that there is no judgment in the lower court which is the subject of review in this. The judgment below is in the following form: "It is, therefore, ordered and adjudged by the court that this cause be dismissed, and that defendants recover of plaintiff, W. B. Moody, all costs accrued herein, and have thereof execution. And the jury are, by order of the court, discharged." In *Boggess v. Cox*, 48 Mo. 278, the judgment was as follows: "Wherefore, the court gave judgment against him for costs." This case and the one at bar were where the plaintiff took a non-suit with leave to move to set it aside, and when the motion to set aside was overruled, the court rendered the judgments as set out. In *Boggess v. Cox*, *supra*, Wagner, Judge, said: "When a non-suit is taken, in order to justify an appeal or writ of error, the judgment should be formally set out; that it is by the court, therefore, considered and adjudged that the plaintiff take nothing by his writ, and that the defendant go thereof without day and recover of the plaintiff his costs," etc. In *Rogers v. Gossnell*, 51 Mo. 466, this was held to be a good judgment, "that defendant go hence, and that he recover his costs." A judgment will be held sufficient when it appears to have been intended by some competent tribunal as the determination of the rights of the parties to an action, and

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shows, in intelligible language, the relief granted. Freeman on Judgments, sec. 47. In section 50, of the same work, it is said: "Whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal, if it show: (1) The relief granted. (2) That the grant was made by the court, in whose records the entry is written." It must also, of course, show the parties of and for whom it is given. *Maxwell v. Stewart*, 22 Wall. 79. At all events, we hold the judgment in this case to be sufficiently formal. Fully up to the requirements, though not in the exact form as that required in 48 Mo., *supra*.

The judgment of the court below is reversed and the cause remanded. All concur.

DOW V. CHANDLER, *Appellant*.

United States Collector's Deed, VOID ON FACE, WHEN: STATUTE.

A deed by the United States collector of internal revenue, made under a seizure and sale of real estate for taxes, is void on its face when it appears therefrom that the twenty days, notice of the sale required by Revised Statutes of United States, section 3197, was not given to the defendant in such proceeding.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER, Judge.

REVERSED.

John O' Day for appellant.

(1) Respondent in this case seeks to recover under a tax deed executed by a United States collector of internal revenue. Sales of real estate for non-payment of taxes are *ex parte* and summary proceedings, and it must

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appear that the proceedings of law preparatory to and authorizing such sales have been punctiliously complied with. If these fail the power to sell is not created. If any one of them fails it is as void as if all failed. The court cannot aid the defective execution of a statutory power. It is, therefore, an axiom accepted that when tax sales are under consideration a fundamental condition to their validity is that a strict compliance with the law in all proceedings, of which the sale was the climax, must be proven. *Blackwell on Tax Titles*, 120, 215, 223, 251; *Cooley on Taxation*, 324, 325; *Smith v. Funk*, 57 Mo. 239; *Abbot v. Dolan*, 49 Mo. 304; *Spurlock v. Allen*, 49 Mo. 178; *Cook v. Hacklemann*, 45 Mo. 320; *Yankee v. Thompson*, 51 Mo. 238; *Hughey v. Harrell*, 2 Hammond 231; *Parker v. Rule's Lessee*, 9 Cranch 64-70; *Williams v. Patton*, 4 Wheat. 77; *McClurg v. Ross*, 5 Wheaton 116; *Ferris v. Cooper*, 10 Cal. 589; *Wilson v. Bell*, 7 Leigh 22; *Brown v. Veazie*, 25 Me. 359; *Harrington v. Worcester*, 6 Allen, 576. (2) Notice of the sale must have been given in the manner required by statute. Any deviation therefrom rendered the sale void. Although notice may have been given in one of the methods provided by the statute, still that would not be sufficient; each and every part of the statute must have been complied with. *Blackwell on Tax Titles*, 120; *Hughey v. Harrell*, 2 Hammond, 231; *Yankee v. Thompson*, 51 Mo. 240; *Smith v. Funk*, 57 Mo. 239; *Spurlock v. Allen*, 49 Mo. 178; 9 Cranch, 70.

H. C. Young and *C. W. Thrasher* for respondent.

(1) The statute of the United States, under which the deed in controversy was made, makes it *prima facie* evidence of the facts stated therein in favor of the grantee in such deed and any one seeking to avoid such deed, because the facts recited therein are not true, must take the burden of disproving such facts. *Hilliard on Taxation*, 505 and 506; *Turney v. Yeoman*, 16 Ohio 24; *City, etc., v. Oeters*, 36 Mo. 456. (2) The deed sufficiently

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recites that legal notice was given of the sale. (3) The official seal of the collector making the deed impressed upon the paper is a sufficient sealing of the deed. *Meyers v Russell*, 52 Mo. 26.

BLACK, J.—This was an action of ejectment for a tract of land in Greene county. Plaintiff's title was a deed from the United States collector of internal revenue, dated March 21, 1873, to Onstott, and a deed from him to plaintiff. The collector's deed was based upon a sale made on the twenty-ninth of December, 1871, for a deficiency tax on the November list of 1879, and a capacity tax on the February list of 1870, assessed against the defendant as a distiller. This deed was read in evidence over the objections of the defendant, and as neither party offered evidence to support or impeach the deed, it must stand or fall on its own recitals. The deed must state the same facts which are required to be stated in the certificate of sale—that is to say, it must "set forth the real estate purchased, for whose taxes the same was sold, the name of the purchaser, the price paid therefor," and be executed in accordance with the laws of this state upon the subject of sales of real estate under execution. When so made it "shall be *prima facie* evidence of the facts therein stated, and if the proceedings of the officer as set forth have been substantially in accordance with the provisions of law," the deed shall operate as a conveyance, etc. Revised Statutes of the United States, sections 3198 and 3199. Numerous objections are made to the validity of this deed, but we do not regard any of them as vital, save the one with respect to notice of sale.

Section 3197 (R. S. of U. S) provides that the officer "shall give notice to the person whose estate it is proposed to sell, by giving him in hand or leaving at his last or usual place of abode * * * a notice in writing, stating what particular estate is to be sold, describing the same with reasonable certainty, and the time

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when, and place where said officer proposes to sell the same, which time shall not be less than twenty, nor more than forty days from the time of giving said notice. The said officer shall also cause a notification to the same effect to be published in some newspaper within the county where such seizure is made * * * and shall cause like notice to be posted at the post office nearest to the estate seized, and in two other public places," etc. The personal notice was given on the ninth of December, and the sale was made on the twenty-ninth of the same month. The personal notice appears to be sufficient. The deed recites that publication was made in a designated weekly newspaper "for three weeks successively, to-wit: on the fourteenth, twenty-first and twenty-eighth days of December, 1871;" it also recites that a like notice was posted at the post office, and at two other public places. While the recital is, that three weeks' notice was given, yet the facts stated show that less than twenty days' notice was given, for the first publication was on the fourteenth and the sale was on the twenty-ninth of December.

The contention is that the law did not require any specific time of publication or of the notices to be posted. These proceedings are summary, and it appears to be the plain purpose of the law to give notice of the sale, not only to the person whose property is to be sold, but to the public. The construction contended for by the plaintiff would make notice by publication and posting for any length of time sufficient. This is clearly not the purpose of the law, for it contemplates a substantial notice to bidders. But one reasonable construction can be given to the statute, and that is that the newspaper publication and the notices to be posted must all be given for not less than twenty days before the day of sale. The deed is, therefore, void on its face, for it shows affirmatively that the law was not complied with in the

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matter of giving notice of sale. The deed should have been excluded.

Judgment reversed and cause remanded. Henry, C. J., absent. The other judges concur.

GROLL, *Appellant*, v. TOWER.

1. **Demurrer to Evidence.** The rule is well settled as to a demurrer to the evidence that if there is any evidence tending to prove the issues of fact, the case must go to the jury.
2. ——— : **NEGLIGENCE.** Where plaintiff seeks to recover for the death of her husband, alleged to have resulted from a fall caused by the negligence of the defendant, his employer, in furnishing a defective platform, and the evidence fails to show the fall of the deceased, a demurrer thereto is properly sustained.
3. **Material Averment, Failure of Proof of.** Where there is failure of proof of a material averment in the petition, there can be no recovery.
4. **Witness: PHYSICIAN, COMPETENCY OF: STATUTE.** Under Revised Statutes, section 4017, relating to persons who are incompetent to testify, the evidence of an attending physician, if offered by the patient or his representative, is competent. Where it is offered by the opposite party the physician cannot testify against the objection of the patient, or his representative. *Gartside v. Insurance Company*, 76 Mo. 446, distinguished.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Gottschalk & Bantz for appellant.

(1) The court erred in excluding the testimony of the physician. The statute should not be construed as a prohibition upon the admission of such testimony under all circumstances. The statute does not create a privilege in favor of the physician; it was intended to secure

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the patient from discharges by the physician. *R. R. v. Martin*, 41 Mich. 667; *Scripps v. Foster*, 41 Mich. 742; *Staunton v. Parker*, 19 Hun (N. Y.) 55. (2) The evidence made out a case of negligence. It was the duty of defendant to furnish proper and safe machinery, and he is bound to know of its defects. *Porter v. R. R.*, 71 Mo. 66; *Reber v. Tower*, 11 Mo. App. 199; *Dowling v. Allen*, 74 Mo. 14. It was not the duty of Groll to inspect or know of the defects. Cases *supra*. (3) All inferences which may be drawn from the facts shown are to be construed in favor of plaintiff. *Mauerman v. Siemerts*, 71 Mo. 101; *Buesching v. St. Louis Gas Light Company*, 73 Mo. 219.

Dyer, Lee & Ellis for respondent.

(1) There is absolutely nothing in the testimony to fasten any liability upon the defendant for the injuries sustained by Groll, and especially is this so in view of the recitals in the petition concerning the manner in which the injury occurred. (2) The court committed no error in excluding the testimony of the attending physician. *R. S.*, sec. 4017; *Gartside v. Insurance Company*, 76 Mo. 446; *Linz v. Insurance Company*, 8 Mo. App. 363.

EWING, C.—This is an action by the widow of Ed. Groll, deceased, for damages, for injuries sustained by Groll, from which he died, by reason of the negligence of the respondent in failing to provide safe and proper machinery. The petition alleges that Groll, while in the performance of his duties at respondent's soap factory, repaired certain pipes in a tank hereinafter described; that while ascending a ladder from the tank, a platform on which the ladder rested gave way, precipitating him to the bottom of the tank, from which fall he sustained injuries causing his death; that the platform gave way on account of its being constructed of improper material negligently built, and negligently allowed to become

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rotten and decayed and remain so. The answer of respondent admits that Groll was his employe at the time of the injury; the necessity of descending into the tank for repairs; the existence of the ladders and platform; that plaintiff is Groll's widow; also Groll's death on the day named in the petition, and alleges contributory negligence. The reply is a general denial.

On the trial in the circuit court, at the close of the plaintiff's evidence, on motion of defendant, the court sustained a demurrer to the evidence, and entered judgment for the defendant. Plaintiff then appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, and from which the plaintiff appealed to this court. There are two questions for consideration: One, did the circuit court err in sustaining the demurrer to the evidence? And, secondly, did it err in excluding the evidence of the physician attending the patient?

I. The rule is well settled as to a demurrer to the evidence, that if there is any evidence tending to prove the issues of fact, the case must go to the jury. *Smith v. Hutchison*, 83 Mo. 683; *Bowen v. Lazalere*, 44 Mo. 383; *Woods v. A. M. Ins. Co.*, 50 Mo. 112; 50 Mo. 149, 198; *Holliday v. Jones*, 59 Mo. 482; *Grady v. A. C. Ins. Co.*, 60 Mo. 116; 2 Greenleaf on Evidence, sec. 295. What are the issues of fact? The petition charges: "That after completing said repairs, said Reber and Groll ascended said ladders, but, before they arrived at the top of said cistern, the platform gave way, precipitating both said Reber and Groll to the bottom of said cistern. * * * That by said fall said Groll sustained serious injuries about his body and head; that after languishing for three and one-half months, he finally died."

There was a great mass of testimony, which it will not be necessary to set out, for the reason that very little of it refers to the charge in that part of the petition above set out. The only evidence upon this question seems to have been that of the witness, Reber, who tes-

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tified, in substance, that he was engineer for defendant. Defendant was owner of a sterine tank. He then described it, showing that it was in a cistern underground, etc. That it got out of fix and was leaking; that he went down to repair it, but found that he could not do it alone, and called the deceased, Groll, who was fireman, down to hold the light for him. He described the mode of getting down into the cistern, which was by means of two ladders, one leading down to a platform, and then another leading below to the bottom of the cistern. That the iron tank was inside the cistern, and there was a space all around the tank, and in this space the ladders went down as stated. He then proceeds: "After he came down and lighted up for me a little while, * * * it got too warm for me down there, and I said to him: 'Ed., this will hold, anyhow; it has got to be fixed different, anyhow, and I will leave.' I then put my caulking materials in my pocket, took one light, and started up, and Ed. did the same with his materials and light." He then proceeds to detail his going up the ladders, and his fall, etc., when plaintiff's counsel asked him: "Where was Groll at that time?" A. "While I was lying there and calling for help, * * * after being in there about five minutes, Groll called to me, and says he, 'Henry, I fell, too.'" Q. "Where was Groll when he spoke to you?" A. "He was down there too, but we could not see each other, on account of the lights being out and it being dark." Q. "When you had reached near the top of the upper ladder, where was Groll at that time?" A. "I can't exactly tell where he was, but he was behind me." Q. "Do you know where Groll was at that time?" A. "I can't tell exactly where he was, because I fell so very quick." Q. "Do you know whether or not you struck Mr. Groll in falling?" A. "No, sir; I don't know." There was much testimony, but none bearing upon the question presented by the above quotation from the petition.

The effort was made by counsel, as it will be seen in

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the examination of Reber, to fix the whereabouts or locality of Groll at the time the accident occurred. The effort was made to show that Groll, at the time, was on the ladder and had commenced to ascend, but nothing of the kind is shown. The witness, Reber, evidently did not know where Groll was. He did not know whether he had started up or not. Reber says: "I then put my caulking materials in my pocket, took one light, and started up, and Ed. did the same with his materials and light." But he did not know whether Groll ever even reached the ladder or not. He only knew he was "behind me," but how far, or where? We might guess that he had started up and was immediately behind Reber; upon the second ladder, when it gave way, and we might, also, guess that, as a prudent man, he remained at the bottom, until Reber should get out. But we must not guess. The jury must be governed by evidence, and reasonable inferences therefrom. The petition alleges: "That by said fall, said Groll sustained serious injuries," etc. But we have seen that the evidence shows no fall, and if no fall, then a material averment remains not proven, without which there could be no recovery, even if there was any evidence which properly connected the illness and death of plaintiff's husband with the alleged fall and injury. We are driven to the conclusion that the plaintiff's evidence failed to make a case upon which to base a recovery, under the petition.

II. It is insisted, secondly, that the circuit court erred in excluding the testimony of the attending physician. Section 4017, Revised Statutes, reads as follows: "The following persons shall be incompetent to testify: * * * Fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." The court of appeals and the

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circuit court held that under this clause of the statute the evidence of the attending physician was incompetent. The Michigan statute upon the same subject, is nearly identical with ours, and the supreme court of that state, in construing their statute, in *Grand Rapids & Indiana Railroad Co. v. Martin*, 41 Mich. 667, say: "The objection that a physician cannot reveal, with his patient's consent, what he has learned during his treatment, is one which, if valid, would render it impossible, in either civil or criminal cases, to use the only testimony which would show the nature and extent of disease. The statute is one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. It is only a question of privilege, and such communications are on the same footing with any other privileged communication, which the public has no concern in suppressing when there is no desire for suppression on the part of the persons concerned." In *Scripps v. Foster*, 41 Mich. 742, it was held that the object of the statute is to prevent the abuse of the confidential relation existing between the physician and his patient, and is for the protection of the latter.

The words of the New York statute are not the same as those of Missouri and Michigan, but convey the same meaning and provide the same privilege; and in *Pierson v. The People*, 18 Hun 239, it was held "that the object and intent of the provision of the code, was the protection of the patient and his representatives against the disclosure of information obtained by a physician in the course of his employment as such." This case was re-affirmed in *Staunton v. Parker*, 19 Hun 55. In *Edington v. Mutual Life Insurance Company*, 67 N. Y. 185, it was held that the right to exclude the testimony prohibited, survives to the representatives in the premises of a deceased person. In *Cahen v. Continental Life Insurance Company*, 41 N. Y. Sup. Ct. 296, it is said: "The true position is, that the statute makes a peremptory rule, but as the rule is made

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for the benefit of the patient, he may waive the right given to him. Until there is such a waiver, the law is as plain as words can be, that the physician shall not be allowed to testify." The same construction is maintained in *Johnson v. Johnson*, 4 Paige 460, and in *The People v. Stout*, 3 Park. Cr. Rep. 670.

Where the evidence of the attending physician is offered by the patient or his representatives, it is competent and admissible. Where it is offered by the opposite party, the physician cannot testify against the objection of the patient or his representatives. The cases referred to fully sustain this doctrine, and we think the rule is based upon substantial reasons. The case of *Gartside v. The Connecticut Mutual Insurance Company*, 76 Mo. 446, was, where the insurance company offered the testimony of the attending physician to prove that Gartside had had *delirium tremens*. This was objected to by the plaintiff, the wife of the deceased, and the objection was properly sustained. The case of *Harriman v. Stowe*, 57 Mo. 93, was a suit for damages resulting to Mrs. Harriman, one of the plaintiffs, by falling through a hatchway in a house of defendant. She offered her attending physician as a witness. The defendant objected because, under the statute, he was incompetent. The circuit court instructed the witness that he should not reveal any information received from the plaintiff while attending her in his professional capacity, which information was necessary to enable him to prescribe for her. In other words, the circuit court virtually sustained the objection. In commenting on this action of the circuit court, Wagner, J., said: "As the court restricted the witness from giving any information forbidden by the statute, the only inquiry is, whether the evidence was admissible on any other principle." While the question of the admissibility of the physician in that case was not discussed in the briefs of counsel, and, therefore, not made prominent in the decision of the court, yet it undoubtedly holds the statute is a bar to the introduction of the

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attending physician, even in behalf of the patient himself. In this, we think, it is in conflict with the authorities upon the question, as well as with the reason of the rule.

From what has been said, it follows that the circuit court erred in excluding the attending physician as a witness, when he was offered by the representative of his patient. Nevertheless, for the failure of the proof to sustain the allegations of the petition in other respects, the judgment of the court below must be affirmed. For, even though the physician had been permitted to testify as to the condition of the plaintiff, that would have made no case for the plaintiff, because of the lack of evidence upon the other question.

The judgment of the court of appeals is affirmed.
All concur.

THE STATE V. COOPER *et al.*, *Appellants*.

1. **Criminal Law: FALSE PRETENSES.** The evidence in this case held sufficient to sustain a conviction under Revised Statutes, section 1561, for obtaining money by means of false pretenses.
2. ———: **EVIDENCE.** Transactions, although extending over several days, and occurring at different times, but having in view the common object of the commission of the crime, are admissible in evidence.
3. **False Pretenses: RECEIVING MONEY BACK.** The fact that the person from whom the money is obtained by false pretenses received it back at the time, or after the arrest of the defendant, can not affect the prosecution for the offence.
4. **Criminal Practice: MISCONDUCT OF JURORS.** Affidavits of jurors will not be received to show their own misconduct, nor will evidence of their declarations, made after the trial, to third persons, be received for such purpose.

Appeal from Holt Circuit Court.—HON. H. S. KELLEY,
Judge.

AFFIRMED.

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L. R. Knowles and *T. H. Parrish* for appellants.

(1) The court erred in admitting as evidence statements of Gray. There was no evidence, whatever, of any conspiracy or combination between Gray and the defendant to commit the offence charged. Until the fact of the conspiracy was established, the statements of Gray were not competent evidence against the defendant, and should have been excluded. *State v. Ross*, 29 Mo. 32; *State v. Duncan*, 64 Mo. 266; *State v. Hickman*, 75 Mo. 416. (2) In any event, the statements of Gray were not competent as evidence, except when made in connection with the commission of the offence, or in furtherance of the common enterprise or purpose to commit the same. This rule the court below abrogated. 1 Greenleaf on Ev., sec. 223; *State v. Ross*, 29 Mo. 32. (3) The court erred in refusing to sustain defendant's demurrer to the evidence. The evidence offered disclosed nothing more than legitimate contracts entered into between the prosecuting witness, Lawrence, Gray, and the defendants, concerning matters about which they had the right to contract. (4) The instructions given by the court, of its own motion, were erroneous, and calculated to mislead the jury.

B. G. Boone, Attorney General, for the state.

(1) The indictment is founded upon section 1561, Revised Statutes, 1879. The form prescribed by said section is carefully followed, and the defendant is clearly informed of the nature and cause of the accusation against him. This is all that is required. Const. Mo., Art. 2, sec. 22; Cooley's Const. Lim. (3 Ed.) 362, note 1; *State v. Fancher*, 71 Mo. 460. (2) The instructions properly declared the law applicable to the case. *State v. Norton*, 76 Mo. 180. (3) The affidavits of third parties, as to remarks made by the juror, Soliday, tending

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to impeach the verdict, were inadmissible. Jurors will not be allowed to impeach or discredit their verdict. *State v. Fox*, 79 Mo. 109, and cases cited. Much less, then, are affidavits of third parties, as to declarations of jurors tending to discredit or impeach the verdict, admissible. *State v. Dieckman*, 11 Mo. App. 538, affirmed by this court, 75 Mo. 570; *Clum v. Smith*, 5 Hill (N. Y.) 560; *Drummond v. Leslie*, 5 Blackf. (Ind.) 453; *Coker v. Hayes*, 16 Fla. 368. It is submitted that the evidence was sufficient to support the verdict, and no errors appearing to justify a reversal, the judgment should be affirmed.

BLACK, J.—The defendants, with one Gray, were indicted under section 1561, Revised Statutes, for obtaining money from one Lawrence, by means of false pretenses, a confidence game, etc.

1. A ground much relied upon to reverse the judgment is, that there was no evidence to support the verdict of guilty, or to justify the court in submitting the cause to the jury. The evidence of Lawrence shows that he lived some five miles from Craig, a small village in Holt county, Missouri. In June, 1884, Gray went to his house, saying he had a patent to sell. What it was does not appear. Lawrence said he had a patent gate, and that was enough for him. Gray examined the gate and declared it to be a good thing. In a few days Gray went to Lawrence's house again, when the latter made to the former what is called a lease, whereby Gray had the right to dispose of certain territory in Kansas. At the request of Gray, Lawrence went to Fairfax, in Atchison county, Missouri, and put up one of these gates for exhibition. While doing this, Thomas made his appearance several times, asked questions about the gate and the territory of Kansas, and said he would like to trade for that territory. Lawrence told him that Gray had that territory; Thomas inquired where Gray

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was. Thereupon Lawrence went with Thomas to Gray's room, at the hotel near by. The evidence tends to show that the parties assumed to be strangers, when they were not. Gray, after some dickering, sold or assigned the lease to Thomas. Two days after this, Gray and Cooper went to Lawrence's house, when Gray stated that they had sold to Thomas too soon, for there was a man who would give fourteen hundred dollars for the Kansas territory. Cooper said he would give that amount if he could get a clear title. This could not be done without getting the lease from Thomas. Cooper said he wanted the patent and would like to work up the Kansas territory. Lawrence said he would think the matter over. In a few days Gray proposed to go in with Lawrence, each furnish half of the money, buy out Thomas and sell to Cooper for fourteen hundred dollars, and divide the money. A contract for the purchase and sale was written up by Cooper between him and Lawrence, the former keeping it, and Gray and Cooper left for Craig. In about two days Lawrence received a letter from Thomas, purporting to be written at Hamburg, Iowa, but post-marked at Fairfax, requesting an interview at Corning, a small village, on a designated day, and saying, also, that he had notified Gray to be there. The three parties met at Corning on the appointed day. After some bartering, which the evidence tends to show was a sham between Gray and Thomas, Lawrence and Gray bought back the lease from Thomas, agreeing to pay therefor six hundred dollars. Gray represented that he did not have but two hundred dollars, and Lawrence was to furnish the four hundred dollars. To enable Lawrence to get the money the parties agreed to meet at Craig the next day, and close the trade, as Thomas would not close up the matter until he got the money. On the next day Lawrence and Gray met at Craig, but Thomas was not there, Gray saying for him that he had to go up the road, but that he had left the lease at Corning, and the latter proposed to

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take the money, go there and get the lease. This Lawrence decided to do, and so both parties went to that place, where they found the lease with an agent, who received the four hundred dollars from Lawrence, and gave up the lease, which was then destroyed. Lawrence then offered to deed his patent to Cooper, who declined to take it, alleging that the title papers were not recorded.

Thomas made these transactions under that name, when his true name was Bill Bond. After the arrest, Cooper gave his name as Meyers. The evidence leads to the conclusion that these parties knew each other well enough all the while; that they cared nothing about the Kansas territory or the patent gate, and that these arrangements were all preconceived. Defendants offered no testimony and as the testimony stands, it can scarcely be believed that these transactions occurred in this way from honest motives. There was ample evidence to justify the court in submitting the cause to the jury.

2. The declarations and acts of Gray, who, it appears, escaped, were admitted only so far as they accompanied and constituted a part of these various transactions. Although the transactions extended over several days, and were had at different places, still they had in view one common object. Under the former rulings of this court they were clearly competent so far as they appear to have been admitted in this case. *State v. Ross*, 29 Mo. 32; *State v. Duncan*, 64 Mo. 266; *State v. Hickman*, 75 Mo. 416. Besides this, it does not appear that exceptions were saved to the introduction of this evidence on the trial.

3. The court told the jury, in substance, by the first instruction given at the request of the state, that if they believed defendants and Gray combined and confederated together to cheat Lawrence out of his money, and in furtherance of that combination entered into the transactions, reciting them; that they were tricks and schemes falsely and fraudulently resorted to, to cheat

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and swindle Lawrence, and that by means and use of them they did, acting in concert, obtain from Lawrence three hundred and fifty dollars, or any other sum, they should find defendants guilty; otherwise, they should acquit. This instruction fully and fairly, with the other as to reasonable doubt, presented the case to the jury. The fact that Lawrence got his money back after or at the time of the arrest cannot affect this prosecution.

4. Another ground for new trial was that a juror had formed and expressed an opinion of the guilt of defendants before the trial. An affidavit of Wilson was filed in support of this, in which Wilson states that he had a conversation with the juror before the trial, in which the juror said that he saw the defendants all together at Corning, the day they got the money; that he had another conversation with the same juror after the trial, in which the juror said that nine jurors were for acquittal and three for conviction; that he told the jurors what he knew and had seen at Corning, and they all "flopped" over and made a verdict of guilty; affiant believed if he had not told them what he knew about the case there were men on the jury who would have stayed there until the April term. Another witness says this juror said he had been subpoenaed as a witness in the case.

It is clearly shown by counter affidavits that the juror had not been subpoenaed in the case. There is nothing in the affidavit of Wilson, so far as relates to the conversation before the trial, to discredit or impeach the juror's competency. As to the conversation with the juror after the trial, it is sufficient to say that affidavits of jurors will not be received to show their own misconduct, nor will evidence of their declarations, made to third persons after the trial, be received for such purpose. *State v. Dieckman*, 11 Mo. App. 538, affirmed in 75 Mo. 570; *Drummond v. Leslie*, 5 Blackf. 453; *Clum v. Smith*, 5 Hill (N. Y.) 560.

We see no error in this record. The judgment is affirmed. Norton, J., absent; the other judges concur.

Brown v. Walker.

BROWN V. WALKER *et al.*, Appellants.

1. **Back Taxes : STATUTE : JURISDICTION : JUDGMENT.** In an action to collect back taxes, under the act of 1877, the circuit court does not exercise its jurisdiction in a special or summary manner, and its judgments therein are entitled to the same presumptions as attend its ordinary judgments.
2. ——— : ——— : ——— : ———. In such a suit a single judgment against several distinct lots is erroneous ; but the objection does not go to the jurisdiction.
3. ——— : **EJECTMENT : JUDGMENT.** In an ejectment suit, the fact that in a back tax suit, a single judgment was rendered against distinct lots, cannot be shown by parol for the purpose of impeaching such judgment.
4. ——— : **IRREGULARITIES : SHERIFF'S DEED.** Mere irregularities in the suit, which led to a sale under execution, do not invalidate the sheriff's deed.
5. ——— : **IMPERFECT DESCRIPTION : EVIDENCE.** An imperfect description of land contained in the tax bill, judgment, execution and sheriff's deed, may, if the ambiguity is latent and susceptible of oral explanation, be made certain by extrinsic evidence ; and it is sufficient if the description is such that the land can be located by one acquainted with the plats and surveys.
6. **Ejectment : PURCHASER AT TAX SALE : DEFENCE.** In an action of ejectment by a purchaser at a tax sale, the fact that the sheriff sold two lots together cannot be set up as a defence.
7. ——— : **JUDGMENT : LANDLORD AND TENANT.** A judgment in ejectment is properly rendered against both the landlord and tenant in possession.*

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Broadhead & Haeussler, and C. V. Scott for appellants.

D. W. Sadler for respondent.

* These syllabi are taken from 11 Mo. App. 226.

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RAY, J.—This was an action of ejectment, in the usual form, and the answer a general denial. At the trial, in the circuit court, the plaintiff had judgment, from which the defendants appealed to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, and from which the defendant again appealed to this court. The case is reported in 11 Missouri Appeal Reports, page 226. The opinion of that court, upon examination, is believed to be well supported by the authorities cited. It is in harmony with prior rulings of this court, as well as more recent decisions, to the same effect: (*Wellshear v. Kelley*, 69 Mo. 343, and *Gray v. Bowles*, 74 Mo. 419), where substantially the same point is ruled, as is involved in the case at bar. We find nothing in the briefs of counsel in this court calling for a different result, and the judgment of the court of appeals is, therefore, affirmed. All concur.

THE STATE *ex rel.* THE CITY OF KANSAS V. THE CORRIGAN CONSOLIDATED STREET RAILWAY COMPANY,
Appellant.

1. **Municipal Corporation: CHARTER: HORSE RAILWAYS.** The usual powers conferred by its charter on a municipal corporation over its streets are sufficient to authorize it to permit their use for horse railways; *aliter* as to railways operated by steam.
2. ———: **ORDINANCE: REPAIRING STREET: CONTRACT.** An ordinance of a city giving the privilege of using its street for a horse railway and which contained a provision requiring the railway company to keep and maintain the space between its rails and for two feet on either side of its track, and all street crossings along its line in good repair, does not impose on such company an obligation to re-construct the street.

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3. ———. An obligation to repair a street is not an obligation to construct thereon a new pavement.
4. ———: ———: POLICE POWER. Nor could the city, by a subsequent ordinance, impose on the railway company, without its consent, such additional obligation to pave the street. Such subsequent ordinance cannot be sustained on the ground that it is a proper exercise of the police power of the city.
5. **City : STREETS : CORPORATE POWERS.** Nor is an ordinance of the city requiring a horse railway to repair the street between the rails and on the sides of such railway, invalid as being a surrender by the city of its corporate power over its streets.

Appeal from Jackson Circuit Court.

REVERSED.

John C. Tarsney for appellant.

(1) Mandamus is not the proper remedy in this case, even if the City of Kansas has the right to require appellant to pave its street as claimed by it. *State ex rel. v. McAuliffe*, 48 Mo. 113; *Mansfield v. Fuller*, 50 Mo. 338; *State, etc., v. Bank*, 76 Mo. 370; *State, etc., v. Ry.*, 43 N. J. 505; *State ex rel. v. Newark*, 6 Vroom 396; *State ex rel., etc., v. Township of Union*, 8 Vroom 84; *Queen v. Hull, etc., Ry.*, 6 Q. B. 70; *State ex rel. v. Ry.*, 14 Vroom 524; 2 Dillon Mun. Corp., secs. 665 and 686; Moses on Mandamus. (2) Under the provisions of the charter of Kansas City and the ordinance of March 27, 1869, under which appellant is operating its road on the street of the city, there was no obligation on its part to pave any portion of the street in any manner. The delegation of power by the legislature to a municipal corporation to authorize the laying down of street railroad tracks in the streets need not be in express terms, but may be implied or inferred. Dillon on Mun. Corp., secs. 550, 558, 538, and 578; 58 Ia. 153; *City of St. Louis v. Boffinger*, 19 Mo. 15; *Taylor v. City of Carondelet*, 21 Mo. 110; *Gray v. Crockett*, 31 Kan. —; *B. & H. Ferry*

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Co. v. Daviess, 58 Ia. 133. (3) Neither the legislature nor the common council of Kansas City, could, by any law or ordinance enacted or passed subsequently to the granting of the right of way to appellant's grantor by the ordinance of March 27, 1869, and the acceptance of the same, change the terms of said grant so as to impose on appellant the obligation of paving its street, such obligation not being made a condition of such grant. *St. Louis v. Ry.*, 13 Mo. App. 524; *New York v. Ry.*, 32 N. Y. 261; *New York v. Ry.*, 33 N. Y. 42. An obligation to keep in repair a street is not one to lay down or construct thereon an entirely new pavement. *District, etc., v. Ry.*, 4 Am. and Eng. Railroad Cases, 174; *Baltimore v. Scharf*, 54 Md. 499; *Sheldon v. Chicago*, 9 Wallace 50. (4) Nowhere, in the ordinance of June 29, 1880, is it made the duty of any officer, servant, or employe of the railroad company to pave the street, nor is it made the duty of the company to so pave. By the ordinance of May, 1884, the duty of paving the streets is attempted to be imposed upon the railroad companies, but the information in this cause is not drawn under this last ordinance, but charges an offence in violation of the ordinance of June 29, 1880. It would seem that a mere statement of facts would be sufficient as showing that a conviction in this cause cannot be sustained.

Wash Adams, John J. Campbell and R. H. Field
for respondent.

(1) The evidence wholly fails to show that any *franchise* of the horse or street railway company was amended, or in any manner interfered with by the ordinances of 1880 and 1884. The ordinance of 1869 is certainly *not a franchise*. While the franchises of a corporation may be called a contract, every contract of a corporation is not a *franchise*. A *franchise* is some privilege or right created and granted by the state, and by no other person. *People's Ry. v. Memphis Ry.*,

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10 Wall. 51, and cases there cited. (2) Nor does appellant show that the obligation of any *contract* has been impaired by the ordinances of 1880 and 1884. The ordinance of March 27, 1869, was not a *contract*, because the city authorities had not then the power to make or pass the same to have that effect. Dillon on Mun. Corp. (3 Ed.) secs. 715, 716, 685; *People's Ry. v. Memphis, etc.*, 10 Wall. 50; *Kreigh v. City of Chicago*, 86 Ill. 407; *Hoboken, etc., v. Mayor, etc.*, 36 N. J. Law 540; *Norfolk v. Chamberlaine*, 29 Gratt. 534; *Pettis v. Johnson*, 56 Ind. 139; 76 N. Y. 108; *Gozzler v. Georgetown*, 6 Wheat. 597; *Matthews v. Alexandria*, 68 Mo. 115. Of course the obligations of a valid contract cannot be impaired by a mere license (which was all that the council had power in 1869 to grant). Hence, the argument and authorities of appellant against the right to impair the obligations of a contract are irrelevant and unimportant in this case. *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Columbus v. Catcamp*, 61 Ia. 672; *Freleigh v. State*, 8 Ia. 606; Cooley's Const. Lim. (5 Ed.) 343. (3) But if the ordinance of 1869 had been then *expressly authorized*, and, therefore, a contract and not a mere license, section four of that ordinance here relied upon by appellant must be held void if it means, or was intended to mean what appellant claims it means, because that would be a surrender of the police power of the state, which, not only the council, but the legislature of the state itself, could not do. Cooley's Const. Lim., side page 283; *State v. Matthews*, 44 Mo. 523; *Moore v. State*, 48 Miss. 147; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, and cases cited; Cooley on Const. Lim. (5 Ed.) top page 710. The ordinances under which these proceedings are prosecuted are expressly authorized by the legislature and are *police regulations*. As another ordinance shows the street railroad companies are given the preferred, and if necessary, the exclusive use of that part of the street occupied by them for the running of their cars. This space is all of the street that they are required to

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pave. Compulsory pavement of that much is clearly within the police power, because of the peculiar interest and situation of the street railroad company in and to that part of the street, and the special benefit it derived therefrom. Desty on Taxation, 1364, 1376, 1374, *et seq.*; *Macon v. Patty*, 57 Miss. 378-408; Cooley on Taxation, 398, 399, 400, 401, and 402; Dillon Mun. Corp. (3 Ed.) sec. 394; *North Chicago Co. v. Lake View*, 105 Ill. 183; *Union Ry. Co. v. Mayor, etc., of Cambridge*, 11 Allen 287; Cooley on Const. Lim. (5 Ed.) top page 710; *Thorpe v. Ry. Co.*, 27 Vt. 140; *People v. Ry.*, 70 N. Y. 569; *Frankford v. City of Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. (4) The ordinance of 1869 does not purport to exempt appellant from the duty of paving the portion of the street occupied by it, and even if it did create such exemption, it does not fully appear that its assignee could take advantage of it. *Morgan v. Louisiana*, 93 U. S. 217; *Stewart v. Jones*, 40 Mo. 141. (5) The ordinance of 1880 and that of 1884 certainly made it the duty of the Corrigan Consolidated Street Railway Company to pave the space between its tracks and eighteen inches on the outside thereof as the balance of the roadway was paved. These ordinances, being expressly authorized in the charter, have the same force, dignity, and effect as if they were statutes enacted by the legislature of the state. Dillon on Mun. Corp. (3 Ed.) sec. 308; *Taylor v. Carondelet*, 22 Mo. 105, 106. And with such power from the legislature to pass such ordinances, the courts are not at liberty to inquire into their reasonableness. Dillon on Mun. Corp. (3 Ed.) sec. 328. (6) The duty of the street railway company to pave as aforesaid can be enforced by *mandamus*. *Rex v. Ry. Co.*, 2 Barn. & Ald. 646; *State v. Ry. Co.*, 37 Conn. 154; *People ex rel. Kimball v. B. & A. Ry. Co.*, 70 N. Y. 569; *People v. Ry. Co.*, 76 N. Y. 294; *People v. D. & C. Ry. Co.*, 58 N. Y. 153; Rorer on Railroads, 617; 63 Me. 269. (7) And the pro-

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vision of the ordinance imposing a *fine* upon the officers and agents of any street railroad company for operating such railroad, when the space between the rails and eighteen inches on the outside thereof are not paved, as the balance of the street is paved, is a valid provision and enforceable by prosecution. *Goddard, Petitioner*, 16 Pickering 504; *North Chicago City Ry Co. v. Lake View*, 105 Ill. 183; *Ex Parte Hollwedell*, 74 Mo. 395; *St. Louis v. Steinberg*, 69 Mo. 289; *City of Kansas v. Flanders*, 71 Mo. 284; Charter of Kansas City, Laws 1875, page 209, sec. 8; also page 207, *Id.*, paragraph *thirty-third*; also, page 208, *Id.*, paragraph *thirty-ninth*.

George W. McCrary also for respondent.

(1) The common council of Kansas City had, in 1869, no power to enter into an irrevocable contract, binding for twenty years, and granting to a street railway company a vested right to operate a street railway in the streets of the city. *Dillon on Mun. Corp.*, secs. 715, 716, and 717; *Davis v. The Mayor, etc.*, 14 N. Y. 506; *People v. Ry.*, 10 Wall. 38. (2) The power of Kansas City to contract for the construction and operation of horse railways in the streets, even if conceded, does not include the power to alienate the control of the streets, and of street improvement vested in the council by the charter. *Cooley's Const. Lim.* 251; *East Hartford v. Bridge Co.*, 10 How. (U. S.) 511; *Brick Pres. Church v. City of New York*, 5 Cow. 538; *Milhan v. Sharp*, 17 Barb. 435; *Canal Co. v. St. Louis*, 2 Dillon 87; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Slaughter House Cases*, 30 Alb. L. J. 152. (3) If it were conceded that the ordinance of 1869, by reason of its amendments, falls under the provisions of the charter of 1870, then it follows that the grant is subject to the power of the common council to regulate and control the street railway and the use thereof. (4) The ordinance of 1869, so far from exempting the street railway company from obey-

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ing the ordinances of 1880 and 1884, respecting paving between the rails, etc., by its terms requires such obedience. (5) Even if section four of the ordinance of 1869 be considered as amounting to a contract, it does not by its terms exempt the street railway from the duty of paving as required by the ordinances of 1880 and 1884. (6) The ordinances of 1880 and 1884 are a proper exercise of the police power of the city. *Cooley's Const. Lim.* 706; *Commonwealth v. Alger*, 7 Cush. 53; *Thorp v. Ry. Co.*, 27 Vt. 140; *Macon v. Latty*, 57 Miss. 378; *Beer Co. v. Mass.*, 97 U. S. 33; *Benson v. Mayor*, 10 Barb. 223; *Railroad Co. v. Tilton*, 12 Ind. 3; *Railroad v. Kircheval*, 16 Ind. 84. (7) Mandamus is an appropriate remedy for enforcing obedience to the ordinance of May 24, 1884. *Morawetz on Corp.*, secs: 487 and 489; 9 Am. & Eng. R. R. Cases, 1. (8) The ordinance of June 20, 1880, is valid. *Dillon on Mun. Corp.*, sec. 394.

NORTON, J.—This is a proceeding by mandamus begun in the circuit court of Jackson county to compel the defendant to pave so much of Union avenue (a street in the City of Kansas), as lies between the rails of a horse railroad operated on said avenue and owned by defendant company, and also eighteen inches on the outside of said rails along said track, in the same manner and with like material, at the same time and as fast as the balance of said street may be paved to completion. A return was made to the alternative writ and a trial had upon the issues presented, which resulted in a judgment of the court awarding a peremptory writ, from which the defendant has appealed to this court

It appears from the record that the Jackson County Horse Railroad Company on March 27, 1869, was duly incorporated under the laws of this state as a private corporation for the purpose of constructing and operating a horse railroad over the streets of the City of Kansas; that on said day the City of Kansas granted by ordinance

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to the said Jackson County Horse Railroad Company the right to construct, maintain, and operate a horse railroad on various streets in said city, of which Union avenue is one, for the period of twenty years. Sections four and twelve of said ordinance are as follows: "Section four. The space between the rails of said track and the street for a space of two feet on either side and along the line of said track, and also all street crossings along the line of said street railroad shall be kept and maintained in good repair by said railroad company, and passing, crossing, or traveling upon or along the streets and avenues, upon or along which such street railroad may pass shall in no wise be obstructed by said railroad company." By section twelve of said ordinance it was provided as follows: "Section twelve. That said horse railroad company shall be governed in all respects by the ordinances of the City of Kansas regulating horse railroads, or in any wise appertaining to such roads." That no other provisions of said ordinance had any relation to the construction or repair of streets or imposed any duty or obligation upon said company regarding the construction, or repair of streets, or any pavement thereupon. That at the date of the enactment of said ordinance and acceptance thereof by said company, there was no general ordinance of the City of Kansas regulating horse railroads or in any wise appertaining to such roads. That by section two of chapter thirty-eight of an ordinance of the City of Kansas entitled, "An ordinance in revision of the ordinances governing the City of Kansas," approved April 19, 1880, said chapter thirty-eight relating to horse railroads, it was provided as follows:

"It further appears [that the said Jackson County Horse Railroad Company, in pursuance of the right granted by said ordinance, constructed and put in operation in 1870 and 1871 several miles of street rail over the streets on which it had obtained the right to operate such road, including that part of Union avenue described in the petition; that said company and defendant com-

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pany, which, in 1874, by purchase, succeeded to all the rights and privileges of the Jackson County Horse Railroad Company, had operated its said street railroad on said avenue from 1870 and 1871.'

It further appears that said Union avenue, on which said railroad was operated, was, on the twenty-seventh day of March, 1869, and at all times thereafter, until May, 1884, had been kept as an unpaved dirt or macadamized street, at which time the city contracted with one Hackett for paving said street exclusive of the space between the rails of said street railway, and a space of eighteen inches on the outside of said rails. Said contract provided for paving said street with Colorado sandstone blocks, to be laid upon a foundation of concrete nine inches thick ; that the same was to be an entirely new pavement, and as a preparation for laying the same the entire macadam and dirt surface was to be graded and removed. It further appears that the defendant, and Thomas Corrigan, as the president of the company, were notified and requested by the city engineer on behalf of the city, immediately after said work was begun by the city, to proceed to lay down and construct a pavement between the rails of said railroad track on said avenue, and for a space of eighteen inches on the outside of the rails with the same kind of materials upon the same kind of foundation and at the same time, and as the paving of the street progressed ; that defendant refused to comply with the request, but proceeded to lay down a pavement between the rails of said track, composed of stone blocks taken from a quarry at Argentine, Kansas, which were of the same dimensions of the Colorado sandstone blocks being used by the said Hackett ; that at the commencement of these proceedings the said paving between the rails was being done by the defendant more rapidly than the remainder of the street was being done by the contractor of the city ; that the said pavement so laid by defendant in no way interfered with public travel and

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presented as smooth and regular a surface as that laid by the city.

Upon the refusal of defendant to comply with the above request of the city engineer, this proceeding was instituted to compel defendant to pave said street between its rails, and for a space of eighteen inches outside of them, with the same kind of material and in the same manner the street was being paved by said Hackett under his contract with the city. The city bases its title to the relief it seeks in this proceeding mainly on the following ordinances, the first one of which was adopted on June 29, 1880, and the second on May 24, 1884. They are as follows :

"SECTION 1. No person, company, or corporation, nor any person as president, superintendent, or other officer or agent of any street or horse railroad company or corporation shall keep, use, or maintain any street or horse railroad track, or part of a track, upon any street, or part of a street, in the City of Kansas, which said street, or part of said street, is now or may hereafter be paved with blocks of wood, stone, granite, or other material, unless the space between the rails of such track, and also the space adjoining and on the outside of such rails for the distance of eighteen inches in width, shall be paved with like blocks of stone, wood, granite, or other materials in the same manner and for the same distance lengthwise that the balance of said street or part thereof may be paved."

"SEC. 2. No person, company, or corporation, nor any person as president, superintendent, or any other officer, or agent, of any horse railway company, or corporation shall run, operate, or maintain any street or horse railway in the City of Kansas, unless the space between and on the outside of the track thereof be paved as required by the preceding section."

"SEC. 5. Any person, company, or corporation, or any president, superintendent or other officer or agent of any street or horse railway company or corporation vio-

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lating any provision of sections one (1), two (2), or four (4), of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof before the city recorder shall be fined not less than one hundred nor more than five hundred dollars."

The ordinance of May 29, 1884, is as follows :

"SECTION 1. It shall be the duty of every individual, company, or corporation owning or operating any horse or street railroads now constructed, or that may hereafter be constructed within the limits of the City of Kansas, to pave the space between the rails of such railroad, and eighteen inches on the outside thereof, immediately adjoining the outside rails as the roadway beyond such limits may be paved. If the roadway be paved with stone, or wood, or other materials, such space between the rails and eighteen inches outside shall be paved with stone, or wood, or like material of the same quality, equally as good and in a similar manner, and upon the same specifications as the balance of the roadway shall be paved."

"SEC. 3. This ordinance is declaratory of the duties prescribed in an ordinance entitled, 'An ordinance to regulate street railways, and requiring them to pave their tracks and keep the same in repair,' approved June 29, 1880, and is not intended to repeal or supersede any part of said ordinance."

"SEC. 4. Such paving between such rails and eighteen inches outside thereof shall be done at the same time that the balance of the street is paved, and as fast as such paving progresses to completion. In case any railroad track shall be constructed or reconstructed on, along, or across any street already paved, it shall be the duty of the person, company, or corporation owning or operating such road to pave the track and eighteen inches outside thereof, as required by this ordinance, as fast as such track shall be laid, constructed, or reconstructed, so as to have such space paved immediately

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upon the completion of such laying, construction, or reconstruction."

It is argued on the part of the defendant that neither under the charter of Kansas City, nor under the ordinance of March 27, 1869, by virtue of which it constructed and operated its road, did it assume an obligation to pave any portion of said street in any manner, but that the only obligation it did assume was to keep and maintain in good repair the space between its rails and two feet thereof on the sides and along the track of its road, and all street crossings along the line of said track, and that the said ordinances of June 20, 1880, and May 24, 1884, are void as to defendant, because they are violative of the agreement made between it and the city by the ordinance of March 27, 1869, in that it sought by them to impose a new and additional burden on defendant, namely, the reconstruction of Union avenue by putting down a new pavement, when, under its contract with the city, it is only chargeable with the obligation to repair. On the other hand, it is contended by counsel that the said ordinance, relied upon by defendant, afforded it no protection in the present proceeding, because the charter of the City of Kansas at the time of its adoption contained no provision expressly authorizing it to grant rights to street railways, or authorizing it to make contracts for the construction and operation of street railroads in the streets of said city; that under its charter the city only had the right to license or permit the laying of tracks in the streets in short lines and subject to revocation at the pleasure of the city; that the city, under its charter, did not have the right to enter into a contract with a corporation or other person authorizing the construction of a street railroad and its operation for a specified and limited time. The charter of Kansas City at the time the ordinance relied on by defendant was adopted, while it expressly gave to the city the power to open, grade, improve, and curtail its streets, did not give it in express terms the right to authorize a street rail-

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road to be constructed and operated on them, and because this power was not thus conferred, it is insisted that the ordinance of March 27, 1860, either is a license or contract.

As to the power of a municipal corporation to grant the use of its streets for railways, a marked distinction is taken by the authorities between railways operated by steam and those operated by horses and mules. After an examination by Mr. Dillon of all the reported cases upon the subject of railways in streets, including the case of *Davis v. Mayor of New York*, 14 New York, 506, and other cases cited by counsel for plaintiff, he states in section 727 of his work on Corporations, as the conclusion and result of such investigation the following:

"As respects ordinary railways operated by steam, and street railways operated by horses, legislative authority is necessary to warrant them to be placed in streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads, whose tracks are constructed in the usual manner, and whose trains are propelled by steam, but it is otherwise as respects horse railways, and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit, or refuse to permit, the use of streets within their limits for such purposes. But they cannot by an implied power confer corporate franchises or authorize the taking of tolls. This must come from the legislature."

The reason for this distinction may be found in what is so well stated in the cases of *Hinchman et al. v. Paterson Horse Railroad Company*, 2 C. E. Green (N. J.) 75, and *Jersey City and Bergen Railroad Company v. Hoboken Railroad Company*, 20 N. J. Eq. 69, in the

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last of which it is said: "That the operation of a horse railroad is a legitimate use of the highway and an exercise of the public right of travel. In general, the cars carry persons from any one point on their line to any other point to which they may desire to go. The courts must notice the fact that these street railways have become an important and valuable institution in all our cities and towns, especially valuable to persons of small or moderate means, and their chief value to the many consists in their being in the public streets. If placed in the rear or any distance from the streets their value would be small. They are but a means of using the public streets to a greater advantage for the very purpose for which they were laid out, free and quick transit from one point to another, they are the best and cheapest mode yet devised, and they do not hinder the use of the rest of the street for public travel, and hardly and in a very small degree obstruct the travel on the part occupied by the tracks, except the few inches covered by the iron rails. The cars exclude other vehicles from the space occupied by them when in motion; so do omnibuses and drays. They have when in motion the right of way upon their own track, both as against those whom they meet and those who go in the same direction; a little more extended than the exclusive right of others which have only the exclusive right to one side of the road as against those whom they meet, but it is in principle the same."

If, as stated by Mr. Dillon in the section above quoted, and if, as held in the case of the *Atchison Street Railway v. Missouri Pacific Railway Company*, 31 Kansas 660, and *Brown v. Duplessis*, 14 La. An. 842, the right of control granted to a municipal corporation over its streets, carries with it the power to allow such corporation to grant a permit to a horse railroad company the right to construct and operate its road over its streets, the road ordinance of March 29, 1869, must be held valid. The only condition or burden annexed to

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the privilege given by the ordinance to defendant, to construct and operate its road, was that it should keep and maintain the space between its rails and a space of two feet on either side the line of its track, and all street crossings along its line in good repair. The obligation to repair a street is one thing, and the obligation to reconstruct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation, or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it. Without torturing the language of section four of the ordinance of 1869, and turning it away from its ordinary meaning, we cannot construe it so as to impose on defendant an obligation to reconstruct a street when in express terms it says the street shall be maintained and kept in good repair. The following authorities hold that an obligation to repair a street is not an obligation to construct thereon a new pavement: *Chicago v. Sheldon*, 9 Wall. 50; *District of Columbia v. Washington Railroad Company*, 4 Am. and Eng. Railroad Cases, at page 174, the principle announced in the case of *Chicago v. Sheldon*, is approved.

So in the case of *Farrar v. City of St. Louis*, 80 Mo. 379, where the charter of the city of St. Louis provided that the cost of repaving all streets should be paid out of the general fund of the city, and when the city council had passed an ordinance requiring the pavement on Washington avenue to be taken up and the same to be repaved with granite laid down on the concrete foundation, and providing that the cost of such repairing should be assessed against and paid by the persons owning property fronting on the avenue, according to the frontage, some of the property owners resisted the payment of the cost of repaving on various grounds, one of them being that the repaving of the avenue was nothing more than simply repairing it,

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and that the city, by virtue of its charter provision, was bound to pay the cost of the work out of the general or common fund, and that it was not chargeable against the persons owning property abutting on the avenue. The court held that the property owners, and not the city were liable for the cost of the whole, putting its decision on the ground that the reconstruction of the street and laying down upon it a new and different pavement was not repairing it.

It has been argued, however, by counsel, that, conceding the defendant was not bound by the ordinance of 1869 to pave, but only to maintain and keep it in good repair, as therein provided, the obligation to do so was imposed by the ordinance of 1884. We are authorized to assume that at the time the ordinance of 1869 was adopted, the representatives of the city had in their minds, first, the propriety and expediency of granting the right to the company of operating its railroad on the streets of the city, and the length of time the right to do so should exist; and second, the terms and conditions which should be annexed to the grant. The only condition imposed, in so far as the ordinance relates to the streets on which the railroad was to be operated, was that the company should maintain and keep certain parts of them in good repair. The company had the right to conclude in accepting the grant with only the above condition annexed, that in so doing it could not be charged with any other obligation than that of repairing so much of the streets as the ordinance specified. The ordinance, when accepted, was the contract of the parties, and fixed their respective rights and obligations. The said ordinance of 1884 undertakes to change this contract without the consent of the other contracting party by the imposition of a new and different obligation. This cannot be done unless we ignore the principle that it takes two to make a contract, and two to alter or change it when made. As a consideration for the grant, the company bound itself to keep in repair certain parts of

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the streets, and to that extent agreed to relieve the city from the payment of costs for such repairs. If, after acceptance by the company of the grant with the said condition annexed, and the construction of its road at great cost, the city could, as it undertook to do in the ordinance of 1884, impose the new and additional obligation of paving a certain part of the street, why might it not require it to pave at its own cost the entire street, and keep it in repair when thus paved?

It is further contended that even if the city council had the power to contract for the construction and operation of street railroads, in exercising such power it could not alienate the control of the streets and of street improvements vested in the council by the charter. We recognize, in all its broadness, the doctrine laid down in section 97, *Dillon on Corporations*, where it is said: "Powers are conferred upon municipal corporations for public purposes, and as their legislative powers, as we have just seen, cannot be delegated, so they cannot be bartered or bargained away. Such corporations may make authorized contracts, but they have no power as a party to make contracts or frame by-laws which shall cede away, control, or embarrass their legislative governmental power, or which shall disable them from performing their public duties." While we recognize the soundness of the principle invoked, we cannot see that it has any application to the ordinance in question. If by the ordinance of 1869 the council had delegated to the company its control over the streets, or disabled themselves from taking up the macadam and dirt surface of Union avenue or any other street, and reconstructing it with a different pavement, we would have no hesitancy in declaring it to that extent void. But such is not the effect of the ordinance, and it is not susceptible of being construed so as to deny to the city council the right at any time to improve the streets on which defendant is operating its railroad, or any of them, by macadamizing them, or laying down thereon stone or granite pavement and

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charging the cost thereof against the property adjacent or abutting on the streets thus improved, as is provided in the charter. There is nothing in the ordinance forbidding, either expressly or by implication, the exercise of such control by the council over its streets, but on the contrary, when such power is exercised and the street improved, the obligation of defendant to maintain and keep it in repair between the rails of the company's track and the space of two feet on the outside thereof would at once attach. Nor is the power of the council to provide the manner of repairing the street, and requiring the defendant to repair it, in any way prescribed, interfered with, or delegated by the ordinance. It only provides that such repairs shall be made by defendant at its own cost, and to the extent that the city is thus relieved from the payment of such costs, it is beneficial to the public.

It is also insisted that the ordinance of 1884 can be maintained, on the ground that it is a proper exercise of the police power of the city, and that such power cannot be bargained away. Police power, if capable of a definition, is defined as follows, by Mr. Cooley, in his work on Constitutional Limitations, in chapter 16: "The police power of a state in its comprehensive sense, embraces its whole system of internal regulation by which the state seeks not only to preserve the public order and prevent offences against the state, but also to establish for the intercourse of citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." We cannot perceive how it can be claimed that the said ordinance of 1884, which, it is said, imposes upon defendant the duty of paving a part of the streets on which it operates its railroad, under a grant from the city, obliging it to repair and not to repave, is embraced within the police power of the city as above defined, especially so

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in view of the fact that the city had full power conferred on the council by its charter to do the very thing it seeks to require defendant to do by virtue of said ordinance. The city could not, under the pretense of exercising its police power, shift the duty delegated to it by its charter of paving the streets, if public good required it to be done, and charging the cost to adjacent property owners, from its shoulders onto the defendant. Had the ordinance of 1869 provided that the city would not undertake to make regulations as to the operation of defendant's railroad as to the speed at which its cars should be run, the length of time they should stop at its terminal points, the number of hours in the day they should be run, etc., the principle invoked by counsel, that the police power of the city could not be bartered away, would apply. Instead of doing this, however, the city, by section twelve of the ordinance, expressly provided that said horse railroad company shall be governed in all respects by the ordinances of the City of Kansas regulating horse railroads, or in anywise pertaining to such roads. We cannot give the above section of the ordinance the constructions claimed for it by counsel, and so construe it as to make it nullify section four of the ordinance; to do so would be violation of a well established and universal canon of construction, viz., that the provision of all laws, ordinances, and contracts should, if practicable, be construed so that all of them may stand and be made operative. We think it entirely practicable so to construe said section twelve as not to bring it in conflict with section four, by holding it to refer to such regulations as are provided in section two, chapter thirty-eight, of the ordinance of the City of Kansas, heretofore referred to, and which provides that "on all regular routes the cars shall be regularly run for the period of not less than sixteen hours, or longer, if the common council by resolution so order, during each and every day of the entire year, and shall not be allowed to stand longer than fifteen minutes at either terminus of

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the road. Cars on such regular lines shall be run at intervals not exceeding five minutes." Such obligations as the above are a proper exercise of the police power, but to extend it so as to make it include said ordinance of 1884, which imposes a duty on defendant which, by the charter, is imposed on the city council, would be stretching it beyond the limits prescribed by the authorities.

We cannot give our assent to the doctrine contended for, that by virtue of the ordinance of 1869 defendant obtained simply a license to expend large sums of money in constructing its railway, and at a time when the success of such a scheme was experimental, equipping it at great cost, assuming an obligation to keep in repair a certain part of the street, which license was and is revocable at the pleasure of the city. If, as we think, the authorities herein cited establishes the proposition that the general power of control given the city in its charter over the streets carries with it a street railroad operated by horses or mules, to be constructed and operated on and over its streets, when the city exercises the power as it did in the passage of the ordinance of 1869, and granted, permitted, or licensed defendant to build and operate its railroads, and defendant accepted the grant, expended large sums of money on the faith of it, and was permitted by the city to do so, the license referred to was a contract, the terms of which are binding on both parties to it. If any one thing is guarded in the law more particularly than another it is the inviolability of a contract, and all attempts to impair such obligations, under whatever guise they are made, whether directly or indirectly, must prove abortive. *State ex rel. v. Miller*, 66 Mo. 329; *State v. Miller*, 50 Mo. 129; *Hovelman v. K. C. Horse Railroad Co.*, 79 Mo. 632.

In determining this case we have not taken into consideration the amendment to the charter of the city made in 1870, holding as we do that any rights of defendant acquired under the charter as it existed previous to and

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at the time the ordinance of 1869 was adopted were unaffected thereby. *City of St. Louis v. Mo. Railroad Co.*, 13 Mo. App. 524. For the reasons herein given, the judgment of the circuit court awarding a peremptory writ of mandamus is hereby reversed, with the concurrence of all the judges except Judge Black, who, having heretofore been of counsel, did not sit.

HICKS V. JACKSON *et al.*, Appellants.

1. **Parties:** WAIVER. Objections to parties are waived unless made by demurrer or answer.
2. **The conversion** of certain notes and securities held to be within the issues made by the pleadings in this case, and the judgment for their value in favor of a defendant and against a co-defendant, affirmed, and this although the petition was one in ejectment.

Appeal from Saline Circuit Court.—HON. W. T. WOOD,
Judge.

AFFIRMED.

Philips & Jackson for appellant.

(1) The action was one at law and the court erred in ordering Hurt to be brought in as a co-defendant. 2 Jones on Mortgages, 889; *McNair v. Picotte*, 33 Mo. 57; *Wright v. Cornelius*, 10 Mo. 174; *Wolff v. Schaeffer*, 4 Mo. App. 367; *C.*, 74 Mo. 154. Although our courts of law and equity are blended, the distinction between law and equity proceedings exists as much as ever in this state. *Myers v. Field*, 37 Mo. 434; *Pauly v. Vogle*, 42 Mo. 303; *Wynn v. Corey*, 43 Mo. 301. (2) As the issues were purely in law, the court could not render a judgment in favor of

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one defendant against his co-defendant, nor could the court in an action at law render two judgments. (3) According to the finding of the court Hurt's act amounted in law to a conversion and Jackson's remedy was in trover. *Buck v. Kent*, 3 Vt. 99; *Coffin v. Anderson*, 4 Blackf. 395; *St. John v. O'Connell*, 7 Post (Ala.) 466. (4) The judgment recovered against appellant is in excess of the sum sued for, and is not only contrary to the prayer of Jackson's answer, but contrary to the issues made in the pleadings. A party cannot even in equity sue for one thing and recover another; much less can he do so at law. *White v. Rush*, 58 Mo. 105; *McNair v. Biddle*, 8 Mo. 257, 267; *Meade v. Knox*, 12 Mo. 287; *Beck v. Ferrara*, 19 Mo. 30; *Buffington v. Railroad*, 64 Mo. 246; Freeman on Judg., sec. 158; *Graham v. Ry. Co.*, 3 Wall. 704; *Duncan v. Fisher*, 18 Mo. 404; *Pond v. Lockwood*, 8 Ala. 669; *Bolles v. Carli*, 12 Minn. 114, 120. Nor can a party have a standing in chancery where he has a plain remedy at law. 1 Hempstead Cir. Ct. 114, 115; *Thompson v. Manly*, 16 Ga. 440, 442; *Coughron v. Swift*, 18 Ill. 414; *Echols v. Hammond*, 30 Miss. 177; *Norwich Ry. v. Story*, 17 Conn. 364; *Janney v. Spedden*, 38 Mo. 395. (5) Nor can a party recover in any case a greater sum than that sued for. *Carr v. Edwards*, 1 Mo. 137; *Armstrong v. St. Louis*, 3 Mo. App. 100, 105-6, and cases cited. Jackson asked judgment for \$338.50, surplus proceeds of sale of hotel property, and recovered for \$1,200, on account of another matter. (6) Had the answer of Jackson proceeded for the recovery of the amount of said notes, the judgment would be inequitable and bad. If, as the court finds, Hurt held the notes in trust for Jackson and wrongfully turned them over to Hicks, the measure of damages was the value of the notes at the time of the conversion. *Spencer v. Vance*, 57 Mo. 427, 430. The evidence on all sides of this case shows that the makers of the notes were insolvent, and had been; and the security given for the notes had been swept away by foreclosure sale under prior mortgage. In such a case the damages

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are only nominal. *Fry v. Baxter*, 10 Mo. 302-3; *Ingalls v. Lord*, 1 Cow. 240; *Metzner v. Graham*, 66 Mo. 360. A trustee, under such circumstances, is only bound for what he realizes. *Hunter v. Hunter*, 50 Mo. 445. (7) The finding and judgment of the court are against the overwhelming weight of the evidence, contrary to Jackson's conduct, acts and admissions, and are most inequitable.

C. A. Winslow for respondent.

(1) The trial court applied the correct rule to the facts of the case. *Perry on Trusts*, 306, sec. 245; *Tiffany & Bul. on Trusts*, 112, 113; *Van Renselaer v. Morris*, 1 Paige, 13; *Benbury v. Benbury*, 2 Dev. & B. Eq. 235. (2) The court below necessarily found as a matter of fact that by the unwarranted disposition of the collaterals to Hicks the amount thereof was lost to Jackson, and this court cannot say that this finding was wrong from anything that conclusively appears in the record. *Julian v. Abbot*, 73 Mo. 580; *Ryan v. Gilliam*, 75 Mo. 132; *Perry v. Hall*, 75 Mo. 503. (3) It clearly appearing that Hurt converted the notes by transferring them to Hicks instead of returning them to Jackson, the measure of damages, *prima facie*, is the amount called for on their face, and there is nothing shown by the evidence to change this *prima facie* case; and the burden was on Hurt. *Menkens v. Menkens*, 23 Mo. 252; *Bredow v. Mut. Sav. Inst.*, 28 Mo. 181; *State ex rel. v. Berning*, 74 Mo. 87. (4) It is too late to object to the absence of a reply, even if the record fails to show one. *Henslee v. Cannefax*, 49 Mo. 295; *Howell v. Reynolds Co.*, 51 Mo. 154; *Insurance Co. v. Harlan*, 72 Mo. 202. (5) The trial court had jurisdiction of the subject matter and the parties. R. S., sec. 3465. All the facts are set out in the pleadings and general relief is asked. 38 Mo. 55; 37 Mo. 361; 48 Mo. 512. The statute authorized a judgment between the parties. R. S., sec. 3673. None of the objections as to the parties were made in the court below, either by demurrer, answer

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or motion ; and they cannot be made for the first time in this court, even if they were meritorious, which is not the case. R. S., sec. 3774, and notes.

RAY, J.—The facts, presented by this record, are so involved and complicated, that it is quite difficult to summarize them, or to determine, or state with accuracy, their precise import and meaning. At the beginning, however, the case was simple enough ; but in the progress of the cause, by reason of the introduction of a new party as a co-defendant, and the pleadings and issues between them, as well as those between the original plaintiff and defendant, the case became, as above suggested, quite involved and complicated. The action, as originally commenced by plaintiff, Hicks, against defendant, Jackson, was in the nature of ejectment, in the usual form, for the recovery of the possession of “the undivided one-half of the west parts of lots six and seven in block seven, in the town of Marshall, Saline county.”

The second amended answer of defendant, Jackson (upon which, and the reply and answer thereto, the case was finally tried), contained, among other things, an equitable defence and cross-bill, making appellant, Hurt, a party defendant ; and upon the trial of the cause and the hearing of the cross-bill and Hurt's answer thereto, judgment was rendered in favor of plaintiff, Hicks, against defendant, Jackson, for the recovery of the property sued for ; and, also, a judgment in favor of defendant, Jackson, against defendant, Hurt, for the sum of \$1,224.50. From this judgment against him defendant, Jackson, took no appeal ; nor did the plaintiff, Hicks, appeal from any part of the judgment in the cause, so that the real contest now before us, is between the defendants, Jackson and Hurt, on said cross-bill, and the answer thereto and issues thereunder.

To begin, it appears that in March, 1873, one Allen Jackson, being the owner in fee of said lots six and seven, borrowed of said Ossimus Hurt \$2,500, for which he gave

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his note and deed of trust upon the property to secure its payment. Upon the property so encumbered by said deed of trust, there were, it seems, two separate and distinct buildings and improvements, upon different and distinct parts thereof; one of which was known as the "Jackson Hotel property," and the other, as the "Jackson Livery Stable property." Afterwards, in September, 1877, default being made by said Allen Jackson in the payment of said note, the said Hurt caused the property to be advertised for sale under said trust deed. At the sale so advertised it appears that that part of the property known as the "hotel property" was first sold, and that said Hurt became the purchaser at the sum of \$2,001, and immediately thereafter that part known as the "livery stable property," was, also, sold, and that the plaintiff, Hicks, became the purchaser thereof at and for the sum of \$1,700.25, and that deeds therefor were accordingly made to the respective purchasers; it is under the deed so made that Hicks, the plaintiff, claims the property sued for.

It also appears that between the date of said deed of trust in March, 1873, and the sales thereunder, in September, 1877, a great number of complicated transactions, conveyances, sales and agreements were had and made by and between various parties, affecting the title to said property, covered by said deed of trust, and especially that part of it involved in this suit, to many of which the defendant, Jackson, was a party, to others of which one Blackburn, Day and Nickell were parties, and to some of which the defendant, Hurt, was also a party. The first of the transactions, above referred to, was that by which the defendant, Wm. Jackson, by deeds from Allen Jackson, became the owner, subject to said deed of trust, of all the property covered thereby. Subsequently thereto, and after a number of intermediate transactions, the defendant, Wm. Jackson, by deed of general warranty, sold and conveyed to said Wm. A. Nickell an undivided one-half interest in the said "livery stable

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property," for and at the price of \$1,700.25. A part of the proceeds of this sale, it seems, by some arrangement between Day and Nickell and the defendants, Hurt and Jackson, was paid and secured to said Hurt, at his instance, in the following manner, and to the following extent: Said Day gave said Hurt a check on the Marshall bank for \$600, which was immediately cashed, and said Day and Nickell executed to said Hurt their note for \$250, and said Nickell executed his note to Hurt for \$850.25, and to secure the same said Nickell also executed to said Hurt his deed of trust, or mortgage, with power of sale on said undivided half interest in said livery stable property.

It is alleged and claimed by defendant, Jackson, in his said amended answer, that defendant, Hurt, accepted and received the proceeds of this sale from Jackson to Nickell, of said half interest in said livery property, amounting to the sum of \$1,700.25, as a payment and a credit, to that extent, on the original note and trust deed, from Allen Jackson to said Hurt, subject to which said Wm. Jackson then owned the property covered thereby. The defendant, Hurt, in his answer, on the contrary, denies that he received the same as payment on said Allen Jackson's note and deed of trust, but that he received and held said notes and securities only as collateral security therefor. Defendant, Jackson, further claimed that the Allen Jackson note and trust deed were fully paid and extinguished by the payment of said \$1,700.25, and the sale of the said hotel property to Hurt, undersaid deed of trust for \$2,001, and that the subsequent sale to Hicks, the plaintiff, of the livery stable property was without authority of law, wrongful and void, and consequently passed no title to said Hicks. This, the defendant, Hurt, and the plaintiff, Hicks, severally deny. The defendant, Jackson, in his answer, by which said Hurt was brought in as a party defendant, also charges that Hurt subsequently *converted said securities*, so received from him (through said Day and Nickell), to his

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own use, and realized the full benefit thereof. Defendant, Jackson, further charges that defendant, Hurt, and plaintiff, Hicks, before said purchase by Hicks, entered into an agreement, by which said Hicks was to bid said sum of \$1,700.25, and pay the same to Hurt for said livery stable property, and that Hurt was then to turn over to Hicks the said note and deed of trust of Nickell for \$850, and said note of Nickell and Day for \$250, and that Hurt, in pursuance of said agreement, did turn over and deliver said notes and deeds of trust to Hicks accordingly, which said agreement and transaction between said Hurt and Hicks, defendant, Jackson, charges to be fraudulent and damaging as to him.

The answer of Jackson prays that Hurt may be made a party defendant; that the court make a decree quieting his possession; that Hurt pay him the money due him from the sale of said hotel property, for the cancellation of the deed from the trustee to Hicks, "and, also, for such other and further relief as he may be entitled to."

Plaintiff replied to this answer of defendant, Jackson, and among other things denied that Hurt had converted the notes and securities received from Nickell and Day to his own use, or realized any benefit that should be applied on the Allen Jackson note and trust deed; he denies making any such agreement with defendant, Hurt, at or before the sale at which he purchased; but admits that he holds the notes and securities, and denies that he bid for said property and took the notes and trust deeds under any such agreement with Hurt, and claims to have bought in good faith and for value, etc.

Hurt's answer denies generally, and then admits the receipt of the Day check for \$600, but denies that it was given pursuant to the agreement alleged; admits that Day and Nickell gave him the note for \$250, and that Nickell gave his note and deed of trust for \$850.25, but denies that they were given and received in payment of \$1,700 on said Allen Jackson's note and trust deed to

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him, and also denied that he had since *converted* said securities to his own use, or realized the benefit thereof; or that said \$1,700 was a payment *pro tanto* on said Allen Jackson's note and trust deed. The answer of Hurt then charges, in substance, that he accepted and held the notes and securities from Day and Nickell, not as a payment on the Allen Jackson note and trust deed to him, but only as collateral thereto, and being anxious to protect said Nickell and carry out his agreement with him in that behalf, he stipulated with Hicks during the progress of the bidding on said livery stable property, that in the event Hicks purchased it, he would take said notes and make Nickell a deed on his paying said notes, to which Hicks consented, and thereupon he turned over said papers and notes of Nickell and Day to plaintiff, Hicks, of all which facts he charges that defendant, Jackson, had notice and consented thereto; that said notes and securities became worthless and valueless by reason of the sale of Nickell's half interest in the livery stable property, under the Allen Jackson deed of trust, but admits that he turned them over to Hicks after said sale.

The foregoing summary of the facts, pleadings and issues, will present the case appearing in the record with sufficient accuracy for the determination of the real controversy now before us. It appears, generally, from this summary, that William Jackson acquired title to the lots embraced in the Allen Jackson deed of trust, subject to the lien in favor of Hurt for the note thereby secured; that there was a hotel on one part of the lots and a livery stable on another part; that on March 18, 1876, the whole property was sold under the above deed of trust, and William Jackson became the purchaser, but failed to comply with his bid and the sale was abandoned; that Hurt then agreed with Jackson to give him further time, perhaps a year, in consideration of a bonus, which Jackson says was fifteen per cent., and Hurt says was \$350, at least, on a note then drawing ten per cent. compound interest; that Jackson put into his hands as collateral the Black-

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burn note for \$2,800, and the Blackburn-Colbert note for \$1,750, which last was a solvent note given for money loaned; that prior to this arrangement, and after Jackson's purchase, he sold and conveyed the livery stable to Blackburn in consideration of a farm and the \$2,800 note just mentioned, and took a deed of trust on the stable to secure the note, which he subsequently foreclosed and became the purchaser of the title; that Blackburn, after his purchase, sold and exchanged certain interests to Day and Nickell, whereby they became indebted to him, and such transactions were subsequently had between the parties, that Nickell and Jackson became possessed of a half interest each in the stable and stock, and owned and were conducting the same in partnership; that, while matters were in this condition, Jackson, Blackburn, Day and Nickell, who were all bound to each other in connection with the stable property, sought a settlement with Hurt, where y the half interest held by Nickell should be released from the Allen Jackson deed of trust, and the other parties released from their obligations on account of that interest; that these negotiations resulted in an agreement, which was executed July 15, 1876, whereby (as claimed by Jackson) Hurt agreed to accept a certain check drawn by Day for \$600, the note of Nickell for \$856.25, secured by a deed of trust on his half of the stable and stock, and the note of Day for \$256.25, signed by Nickell and secured by a deed of trust on other real estate, as a payment of so much money by Jackson on the note secured by the Allen Jackson deed of trust, and thereupon a like credit was to be entered on the Blackburn-Colbert note as a payment by Blackburn, the half interest of Nickell was to be released from the old deed of trust and the new securities accepted in its place, and Jackson was to execute a deed to Nickell for a half interest in the stable realty; that the note and deeds of trust, and the deed from Jackson, were all executed and delivered in accordance with the agreement, the credits were entered on the Blackburn-Colbert note, and all parts

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of the agreement carried out, except the entry of the credits on the old note by Hurt; that the check and new notes and deeds of trust were all taken in Hurt's name by his direction; that, September 15, 1877, Hurt caused all the property covered by the old deed of trust to be sold; that the amount due on his note was then about \$3,570; that he sold the hotel property first for \$2,001, leaving about \$1,489 still unsatisfied; that he then put up the entire interest in the livery stable realty, and Hicks purchased it for \$1,700; that the money received from Hicks was paid to Hurt to the amount of one hundred and twelve dollars in excess of his debt, and that Hurt after the sale transferred the Nickell and Day notes to Hicks.

There was evidence tending to show that Hurt had an agreement with Hicks, made pending the sale, by which Nickell was to be protected, the nature of which does not fully appear; but there was no evidence that this agreement was communicated to Jackson, or the other parties interested, except Nickell, who so far agreed to it as to say that he did not care to whom he paid his money so he got the title to his property. There was, also, evidence tending to show that Hurt agreed with Nickell, before he purchased the property, that he would release the old deeds of trust on his interest, and an assurance that he only put up the whole property because he was advised that it could not be sold in any other way. Hurt, however, denies the agreement to accept the Nickell and Day note and the check as a payment on his note, and the agreement to release the Nickell interest, unless he received the money on the notes, and swears that he only agreed to receive the notes and deeds of trust as collateral. All the parties to the suit testified as witnesses in the cause, and on the vital points of the case there was much direct conflict between them. Other witnesses were also examined, and such of the testimony as we deem material will be noticed in the progress of this opinion.

At the close of the testimony, the court, after find-

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ing for the plaintiff, as against defendant, Jackson, and rendering a judgment against him, for the possession of the property sued for, made the following finding as between the defendants, Jackson and Hurt: "That the defendant, Ossimus Hurt, has in his hands one hundred and twelve dollars, being part of the overplus over and above debt and costs arising from the sale of the said premises on the 15th day of September, 1877, by E. W. Jenkins, trustee, under the deed of trust from Allen Jackson to said Ossimus Hurt, dated the 13th day of March, 1873, which sum was retained by said Hurt, by reason of an error, in calculation of interest and credits on the note secured by said deed of trust. And the court further finds that the defendant, Hurt, had in his hands at the time of said sale notes as follows: One of Stanley H. Day for \$256.25, and another of William A. Nickell and Stanley H. Day for \$856.25, dated July 15, 1876, and both payable to said Hurt, and secured by deeds of trust from said Day and Nickell to said Hurt; and that said trust sale having more than paid said trust debt and costs, said Hurt, from and after the payment and satisfaction of said trust debt, held said notes of said Nickell and Day, and the deeds of trust securing the same, as trustee in trust for the benefit of said William Jackson; and so holding said notes and trust deeds, without authority from said Jackson so assigned, transferred and disposed of the same to the plaintiff, Hicks, that the same cannot be reached by this court, and the amount thereof is lost to the said William Jackson, and that the said Hurt is, in equity, bound to make good to said Jackson the amount of said notes without interest."

On this finding, the court entered a judgment against Hurt in favor of Jackson for \$1,224.50, being the amount of the overplus and the face of the two notes, and divided the costs. From this judgment the defendant, Hurt, after an unsuccessful motion for a new hearing, brings the case here by appeal.

It is insisted for appellant, among other things, that

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if defendant Jackson's allegations as to the payment and satisfaction in full of the Allen Jackson note and deed of trust were true, then there was no necessity of bringing Hurt into the case as a co-defendant, since his defence, in that case, was perfect and available at law. Appellant admits the equity rule, that, where two defendants are in court as necessary parties to a complete determination of plaintiff's cause of action, the court, being thus possessed of the cause, may proceed to adjust the equities and conflicting claims and rights, as between co-defendants, even to giving judgment in favor of one defendant against the other, but he claims we have no precedent, or authority, for a case like this, where the whole matter at issue between plaintiff and defendant can be completely determined without the presence of a third party to stop the suit, "*in limine*," at the instance of defendant, to bring in a third party in order that he may recover an independant judgment against the stranger. Under the code practice, however, it must be remembered that it is now the practice, as provided by section 3673, that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled." Section 3633 also enacts that, "whenever such interlocutory judgment shall be rendered for plaintiff, the damages or other relief shall not be other or greater than that which he shall have demanded in the petition, as originally filed, and served on defendant; *but in any other case the court may grant him any relief, consistent with the case, made by the plaintiff and embraced within the issues.*"

In a case like this, it will not be pretended that the defendant, who shows himself entitled to affirmative relief against his co-defendant, is not to be treated and regarded as against him as a plaintiff, to that extent and for that purpose. The record shows that when defendant,

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Hurt, was brought in as a co-defendant by the original defendant, by way of an equitable defence and cross-bill, that Hurt made no objection that there was any defect of parties, plaintiff or defendant, either by demurrer, or by way of answer, and in such event, section 3519 provides that, "if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same," etc. It is too late thereafter to make that objection, even if it was true, for the first time in this court.

It is, also, urged by appellant that the finding and judgment of the trial court were inconsistent with and unauthorized by the pleadings in the cause; that the theory of Jackson's defence was, that after the turning over to Hurt of the notes and securities mentioned, and the sale of the hotel property under the trust deed, the Allen Jackson note and deed of trust were fully paid and satisfied, and that the subsequent sale of the livery property was, therefore, unauthorized and void and passed no title to Hicks, the purchaser at such sale, and the plaintiff in this suit. It may be conceded that such seems to have been the primary and leading idea and aim of Jackson's answer and cross-bill, but it also appears that said answer and cross-bill further charges that while said sale, as to the livery property, was wrongful and fraudulent, it also expressly charged, in substance, that said Hurt thereby and thereafter *converted* said *securities* so received from Day and Nickell, *to his own use and realized the full benefit thereof*. This charge is distinctly made in Jackson's answer, and is as distinctly denied, both in the reply of the plaintiff, Hicks, and in the answer of Hurt, the co-defendant. This charge, then, was clearly within the pleadings, and the issues made thereby, and there was ample evidence, as the record shows, tending to prove and establish these allegations of the pleadings and the issues thereunder. In this connection the record further shows that while the answer of Jackson prayed that Hurt might be made a party defend-

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ant, and that the court might make a decree quieting defendant's possession, and that Hurt should pay to Jackson the money due him for the sale of the hotel property, and for the cancellation of the trustee's deed to Hicks, *it also prayed for such other and further relief as he might be entitled to.* There is, therefore, no merit in this objection of the appellant.

It is further insisted by appellant that the finding and judgment of the circuit court is contrary to the weight of evidence; is against all the equities of the case, and in contradiction of Jackson's conduct, acts and admissions; that Hurt certainly had not wronged the defendant, Jackson, as he had simply loaned Allen Jackson \$2,500, and taken a deed of trust on the property in question before the defendant became in any way interested therein. It may be conceded that if Hurt had simply stood on his prior right, under his deed of trust from Allen Jackson, the defendant, Jackson, nor no one else, would have had any cause to complain of him. But that is not this case. He was not content, as the record shows, to rely on his prior security, but intermeddled with and mixed himself up with the subsequent rights of third parties to said property in such a way as to impose on him the duty and obligation of dealing fairly and in the utmost good faith with those acquiring rights subsequent to his.

It is also contended for Hurt that the sale to Hicks, under the Allen Jackson deed of trust, carried Nickell's half interest in the livery property, and thus produced a failure of title, as between Jackson and Nickell, the result of which was a failure of the consideration of the Nickell and Day notes and securities, which destroyed their value as collateral security. It may be conceded that such would have been the result if nothing more had appeared and Jackson would, in that event, have had no cause of complaint. But, it is insisted for Jackson, that the record shows Hurt had so intermeddled with the trust property, and so complicated himself by agreements with the various parties interested in it, that he was bound in equity

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and good conscience to enter the Allen Jackson deed of trust satisfied, at least as to Nickell's half interest in the livery property and to refrain from its sale thereunder, and that Hurt, himself, by wrongfully forcing the sale of Nickell's half interest in said livery property, contrary to his agreement with him, thereby destroyed the value of the securities he thus held as collateral to the Allen Jackson deed of trust, to the damage and injury of defendant, Jackson, to whom, the evidence shows, they justly belonged; that his conduct in that behalf was a wrong and a fraud upon said Jackson's half interest in the livery property, was, of itself, of sufficient value, to have paid the balance due on the Allen Jackson note and deed of trust, after the said sale of the hotel property to Hurt. If that be so, it would have been equitable and just on the part of Hurt, under the facts of the case, to have first subjected it to sale before resorting to the Nickell half interest. If that had been done, it is clear that Jackson's notes and securities would have retained their value and availability to said Jackson. It thus appears that Hurt, by his conduct in the premises, protected Nickell at the sacrifice of Jackson, when he might have saved them both, without having endangered his own security. If Hurt, as he claims, held these securities which belonged to Jackson only as collateral, then he had no right, after his Allen Jackson debt was paid, by the sale of the property to Hicks, as he did, and such a disposition of them was wrongful, and of itself amounted to a conversion of them to his own use.

From the finding and judgment above set forth it will be seen that, as to Hicks, the trial court treated the sale as sufficient to pass the title to the property sold, but whether on the ground of estoppel, or innocent purchase, does not appear (nor is it material, because that part of the judgment is not questioned here); but in dealing with Hurt, the court treated him as a trustee, and held him responsible for the face value of the notes and securities so held, on the ground that by his intermeddling with the

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trust property, and his dealings and agreements with the parties interested in it, they became entirely lost to Jackson. Under the facts and circumstances developed in the record we are not prepared to say that the circuit court erred in its said rulings. The facts were all before the court, the witnesses testifying, especially Hurt and Jackson, in direct opposition to each other, were present to be seen, as well as heard, and in all such cases it is the habit and custom of this court not to interfere with the finding and judgment in the trial court, unless they are manifestly erroneous. That we cannot say of this case, and the judgment of the circuit court is, therefore, affirmed. All concur.

WOOD V. NORTMAN, *Plaintiff in Error.*

1. **Practice in Supreme Court.** Objections to evidence will not be reviewed in the Supreme Court, unless the evidence itself is preserved in the bill of exceptions.
2. **Evidence: PUBLIC ACTS.** Acts of congress confirming land titles in Missouri are public acts, and will, therefore, be judicially noticed by the courts.
3. ———. Under Revised Statutes, section 2280, certified copies of the surveys of lands from the files of the office of the register of lands of this state, are admissible in evidence.
4. **Non-Suit.** A non-suit, under Revised Statutes, section 3358, may be taken at any time before the jury retires, or before final submission to the court, and after the law is declared.
5. ———: **NEW ACTION.** A new action held to have been commenced within one year after a non-suit suffered.

Error to Jefferson Circuit Court.—HON. L. F. DINNING,
Judge.

AFFIRMED.

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T. C. Fletcher and *D. T. Jewett* for plaintiff in error.

(1) The evidence offered by plaintiff was insufficient to make out a confirmation under the act of congress of July 4, 1836, because the act itself was not put in evidence, and the act is the confirmation, and is the only evidence of title from the United States. (2) Even if the act had been offered in evidence, there was not made a case such as would give it operation to confirm the land in controversy. *Ashley v. Cramer*, 7 Mo. 98; *Landis v. Perkins*, 12 Mo. 255. (3) It was error to admit in evidence the proceedings in the partition suit among the Douchouquette heirs. There was no final judgment of partition, or approval, of the sale by the sheriff of tracts numbers 103 and 104. No authority was shown to make a deed. *Maeklat v. Debruil*, 9 Mo. 491. (4) The evidence showing, as set up in the answer, that the land in controversy was in possession of Augustine adverse to Wood, since 1864, or 1865, and of the defendant's tenant, one Newman, and that the defendant had never been in actual possession, and Newman, not being a party to the suit, it was error to give judgment against defendant for possession. (5) It was error to admit the transcript of the record of the case tried in St. Louis on October 1, 1877, because it was not a suit between the same parties as in this cause, nor for the same cause of action. The suit tried in St. Louis was for the possession of eighty-seven acres, being the whole of lots or tracts numbers 103 and 104, and the petition in the suit at bar describes the whole of both of said tracts without alleging any number of acres, but a judgment is given for only thirty-seven and a half acres. A non-suit could not be taken after the cause was submitted to the court sitting as a jury. *Benoist v. Murrin*, 48 Mo. 48; 1 R. S. Mo., sec. 3556; certainly not after judgment; *Templeton v. Wolf*, 19 Mo. 101; *Hess v. State Mut.*

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Ins. Co., 21 Mo. 98. (6) The defence of the statute of limitations was well taken. Angell on Limitations (6 Ed.) sec. 328; *Harris v. Dennis*, 1 S. & R. 236.

Crews & Booth for defendant in error.

(1) The evidence of the confirmation was complete. The act of congress of July 4, 1836, was a public act. *Bryan v. Ware*, 4 Mo. 106; *Ott v. Sanders*, 9 Mo. 581; *Biehler v. Coonce*, 9 Mo. 347; *Boyce v. Papin*, 11 Mo. 16; *Page v. Scherbel*, 11 Mo. 167; *McGill v. Somers*, 15 Mo. 80; *Gamache v. Pignignot*, 17 Mo. 310; *Papin v. Ryan*, 32 Mo. 21. Our courts take judicial notice of acts of congress. *State v. Moseley*, 38 Mo. 380; *Wilhelmi v. Wade*, 65 Mo. 39. (2) The certified copy of survey number 3030, from the office of the register of lands of Missouri, was competent evidence. R. S., sec. 2280. (3) The objection that the defendant was not in possession of the premises sued for, is not well taken. (4) The bringing of the original action, the taking of the non-suit therein, and the commencement and prosecution of this suit, under the statute of Missouri, made the present suit in effect a continuation of the first, and prevents the running of the statute of limitations. *Lottman v. Barnett*, 62 Mo. 159.

NORTON, J.—This suit by ejectment was instituted in the circuit court of Jefferson county to recover possession of part of lots 103 and 104, particularly described in the petition. The answer, besides being a general as well as a specific denial of the averments of the petition, also set up the statute of limitations as a bar to plaintiff's right of action. Plaintiff recovered judgment, and defendant brings the same before us on writ of error.

Plaintiff, on the trial, undertook to derive title through one Baptiste Douchouquette, to whom Charles Dehault Delassus, lieutenant-governor of the Spanish province of Upper Louisiana, had, on the thirtieth day

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of December, 1800, granted lands, including that in controversy, which grant it was claimed had been transferred to said Douchouquette and his heirs by act of congress approved July 4, 1836, entitled "An act confirming claims to land in the state of Missouri, and for other purposes." The bill of exception states that plaintiff, to sustain the issues on his part, offered to read from volume seven, American State Papers, on pages 906 and 907, to the claim of Douchouquette as follows, and it is there stated that this volume was borrowed and carried back by plaintiff. The evidence was objected to on the ground that it was incompetent to show a grant or confirmation, or for any purpose of the suit; the objection was overruled, and this action of the court is assigned for error. The evidence is not preserved in the bill of exceptions, and in the absence of it we must indulge the presumption that the ruling of the trial court was correct. The object of introducing this evidence was to show that it embraced the report of the board of commissioners authorized by the act of congress of July 9, 1832, and March 2, 1833, recommending the confirmation of the grant or concession to Douchouquette, or his legal representatives, and that when this was shown, the title of the United States, by virtue of the act of congress of July 4, 1836, passed to Douchouquette, or his legal representatives.

The contention made, that it was necessary to put in evidence the said act of 1836, is answered by the case of *Papin v. Ryan and Walker*, 32 Mo. 21, where it was held that said act was a public act, and that the courts would take judicial notice of it as such.

The plaintiff next put in evidence a copy of survey 3030, certified to by J. E. McHenry, register of lands for this state, as being on file in his office. This was objected to on the ground that it was inadmissible until the confirmation was shown. The objection was overruled, and we think properly, as by section 2280, Revised Statutes, it is provided that such copies shall be receiv-

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able in evidence, and because, as before stated, we have a right to presume that the court admitted the evidence read from the seventh volume, American State Papers (which is not preserved in the bill of exceptions), because it showed that the board of commissioners had recommended to congress the confirmation of the grant on concession to Douchouquette, and his legal representatives. What is here said applies to other objections made to other certified copies of letters on file in the register's office, also offered in evidence, and we deem it unnecessary to notice them more specifically.

Plaintiff then offered the proceedings in a partition suit instituted by the heirs and representatives of Douchouquette for the partition of a large quantity of land, showing the judgment of partition, the appointment of commissioners to make it, their report, in which they make partition in kind of a large portion of it, and report certain other portions not being susceptible of division, the tract in question being included, which report was received and approved, and an order made directing the sale of that portion not susceptible of division for partition, and an order showing approval of sales made. Objection was made to this evidence on the ground that the record did not show that the report of the commissioners was confirmed, nor did it show a report of sales made by the sheriff. The record shows that the report of the commissioners was approved and confirmed, and also an order of sale. While no report of sale was offered in evidence, the record shows that the sheriff was ordered to sell at the April term, 1857. And it further shows that at the term, on the twentieth day of April, 1857, an order was made to the effect that the court approved the sales made by the sheriff of Franklin county, for partition upon the petition of partition filed by Honore Picotte and wife *et al.*, filed April 20, 1857, numbered one, two, three, four, five and six. This, we think, was sufficient to justify the

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court in overruling the objections and receiving the evidence. See *Jones v. Manly*, 58 Mo. 559.

The plaintiff next put in evidence a deed of the sheriff, reciting partition proceeding, order of sale, and all other recitals necessary to its validity, conveying the land in controversy to one Hammack, and also a deed of trust from Hammack conveying the land to secure the payment of certain debts, also a deed showing its sale under said deed of trust, conveying it to plaintiff. We are of the opinion that plaintiff was entitled to recover on the paper title put in evidence, unless his right was cut off by the statute of limitations. It appears from the record before us that plaintiff brought an action of ejectment against defendant, and two other parties for the lot of land sued for in this case; that the suit was transferred to the St. Louis circuit, where it was tried, and judgment rendered on the first day of October, 1877, against the plaintiff; that plaintiff, on the eighth day of October, 1877, filed in said court a motion to set aside said judgment, and allow him to take a non-suit, stating as the ground of the motion that the case was not submitted on the merits, but upon the question whether or not the plaintiff should be permitted to introduce further evidence in support of his case, and because it was understood by the court and the parties, before judgment was rendered, that the plaintiff might have the right of entering a non-suit. This motion was sustained by the court on the twenty-second of October, 1877, the judgment set aside and plaintiff allowed to take a voluntary non-suit. On the thirteenth day of October, 1877, the present suit was brought against this defendant, who was one of the defendants in the original suit in which the non-suit was taken on the twenty-second of October, 1877, for part of the land sued for in the first suit.

Section 3239 provides that if any action shall have been commenced within the times respectively prescribed in this chapter, and plaintiff therein suffered a non-suit, the plaintiff may commence a new action, from time to

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time, within one year after such non-suit suffered. It is insisted by counsel that plaintiff cannot claim the protection of the above section; first, because at the time the suit was brought, the first suit was not only pending, but had ripened into a judgment in favor of the defendants, and that, under section 3556, Revised Statutes, which provides that a "plaintiff shall be allowed to dismiss his suit, or take a non-suit, at any time before the same is finally submitted to the jury, or the court sitting as a jury, or to the court, and not afterwards," the non-suit taken was improperly allowed. It has been held that, under the above section a non-suit may be taken at any time before the jury retires, or before a final submission to the court, and after the law is declared. *Templeton et al. v. Wolf*, 19 Mo. 101; *Lawrence v. Shreve*, 26 Mo. 492. We think it apparent, from the ground relied on, and the reason given in the motion to set aside the judgment, as hereinbefore stated, that the judgment of the court, rendered on the first day of October, 1877, was prematurely rendered, and before the cause, according to the understanding of the parties, was finally submitted to the court, and the court must necessarily have so found when it sustained the motion, set aside the judgment and permitted plaintiff to take a non-suit. Under the circumstances of this case, as we have referred to them, the non-suit was properly allowed. The court not only had the right, but it was its duty, if the facts were as stated in the motion, to set the judgment aside, and, when set aside, the case stood before the court as if no judgment had been rendered in the case or trial had, and without any impairment of plaintiff's right to take a non-suit.

It is also insisted that the present suit being brought to recover only a part of the real estate sued for originally, and only against one of the same defendants, when there were three, that it is not a continuation of the former suit. It is certainly a continuation of it, to the extent of the land sued for, and to the extent of defendant's

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claim to it, and we cannot see how defendant can be prejudiced by the fact that the present suit does not embrace all the land originally sued for. The non-suit may have been taken, as plaintiffs contend it was, because the defendants were sued as having a joint interest in the land, where it appeared on the trial that their interests were several. See *Lottman v. Barnett*, 62 Mo. 159.

It is also insisted that the present suit was brought before, and not after, the non-suit was taken, and for that reason plaintiff cannot claim the protection of said section 3239. This suit was brought five days after the motion to set aside the judgment, in order that plaintiff might take a non-suit, and nine days before the motion was sustained and the non-suit allowed. The suit was evidently brought, as was the suit in the case of *Briant v. Fudge*, in anticipation of the action of the court on the motion, and the fact was stated in the petition filed in this case, which was served on defendant the same day the motion was passed upon and the non-suit allowed, that a non-suit had been taken. This fact, in connection with the facts stated in the motion, was equivalent to a withdrawal of the prosecution of the first suit, and as to the commencement of this suit, and the non-suit, brings the case under the operation of the principles laid down in the case of *Briant v. Fudge*, 63 Mo. 489.

It is also claimed that the judgment is erroneous, because there was no evidence that defendant was in possession of the land sued for at the time suit was brought. While the evidence in reference to defendant being in the actual possession of the land in controversy, is meager, we are not prepared to say that there is no evidence of the fact. Mr. Springate, a witness on behalf of the plaintiff, testified that he had known the land in dispute for nine or ten years. "Julius Nortman has been in possession of these lands eight years or more. The whole tract is in cultivation, say thirty-five acres, or

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more. The whole tract is enclosed by paling and rail fences. The paling fence is getting old." On his cross-examination he stated: "Mr. Nortman never lived on this land, nor is he living there now. It requires constant expense to keep up the farm and fencing. Mr. Newman lives on the farm now, and has lived there probably three or four years; think Augustine lived there before Mr. Newman lived there." Mr. Nortman, in his evidence, stated that most of the land was cleared in 1875 or 1876; that he had cleared up the balance that would do to cultivate since; the fence is paling and rails; it was a good fence when he put it there. "I do not think it the best of fences now; I have repaired, or have had the fences repaired."

While the evidence is clear that Nortman never lived on this land, the fact testified to by him, that he put the fence around it of paling and rails; that it was a good fence, in connection with the fact testified to by Mr. Springate, that the paling was old, and that it required constant expense to keep up the fence; that Nortman had been in possession for eight or nine years, and that Newman was then living on the place, and had been living there for only three or four years, afforded some evidence of Nortman's actual possession previous to that of his tenant, Newman.

For the reason that this action was brought, according to the view we have taken of it, in one year after the non-suit was taken in the former action, the statute of limitations, under the evidence in the case, did not bar plaintiff's right to recover. Judgment affirmed, in which all concur.

St. L. & S. F. Ry. Co. v. Evans & Howard Brick Co.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY,
Plaintiff in Error, v. THE EVANS & HOWARD
FIRE BRICK COMPANY *et al.* *

1. **Condemnation Proceedings:** PRACTICE: EXCEPTIONS: TAKING POSSESSION OF LAND: PAYMENT OF MONEY INTO COURT: STRIKING OUT EXCEPTIONS: ORDERING MONEY PAID TO OWNER: APPEAL: SUPERSedeas: PARTY AGGRIEVED: DISMISSAL OF APPEAL. A railroad company has a right, under the statute, to condemn land, and when the report of the commissioner comes in, and the damages assessed are deemed excessive, to pay the amount assessed to the clerk, to take possession of the land desired in order to construct its road, to file exceptions, to have them heard, and pending the hearing of exceptions to have the money retained by the clerk; and if the court should strike out the exceptions, and order the assessment money paid to the land owner, such order will be a final one, from which the company can appeal with *supersedeas*, as an incident, just as in other civil causes, and the company, in such circumstances, is to be deemed "aggrieved" within the meaning of section 3710, Revised Statutes.
2. **Constitutions, HOW TO BE CONSTRUED.** Constitutions are instruments of a practical nature, to be construed, with the help of common sense, so as to carry out the intention of the framers and adopters of the instrument, and it must be assumed as a basis for the construction of the constitution that an intelligent purpose prompted those who were connected with its making or adoption, and that those thus engaged were familiar with all the vicissitudes of condemnation proceedings, and the statutes and decisions relating thereto, and purposely framed section 21, of article 2, of the constitution, so as to meet the exigencies of filing exceptions, taking possession of land, payment of money into court, appeals, *supersedeas*, etc.
3. **Statutes: CONSTRUCTION OF: PRESUMED TO BE CONSTITUTIONAL.** There is no necessary repugnancy between the statute of 1879, relating to condemnation of land, and section 21, article 2, of the constitution.
4. **Statute, REVISION OF, AFTER ADOPTION OF CONSTITUTION: PRESUMPTION ARISING THEREFROM: LEGISLATIVE CONSTRUCTION OF: CONFORMITY OF STATUTE TO CONSTITUTION: WEIGHT OF.** Where, as in this instance, the legislature has revised a statute after a constitu-

* This case was argued and submitted in connection with the next succeeding one.

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tion has been adopted, such a revision is to be regarded, *pro hac vice*, as a new enactment, and as a legislative construction that the statute so revised, conforms to the constitution: and the courts should give some weight to, and rely with some degree of confidence on such legislative construction.

5. **Construction of SECTION 21, ARTICLE 2, OF CONSTITUTION.** Section 21, article 2, of the constitution, is complied with, both in letter and the ordinary import of its terms, when the money is "paid into court," notwithstanding that exceptions are filed and possession taken of the land. That section of the constitution only guarantees to the land owner "just compensation" and no more, and was never intended to countenance arbitrary assessments and exorbitant exactions.
6. **Compensation, MANNER OF ASCERTAINING.** The constitution has left entirely to the legislature the manner whereby the jury or commissioners are to ascertain the *quantum* of compensation, and that manner or method may well include all necessary details of motions, exceptions, the appointment of new commissioners, or another jury, "as right and justice may require." All means necessary to the end to be accomplished, not inconsistent with the constitution, belong in this regard to the legislature.
7. **No Estoppel in Consequence of Complying with Unconstitutional Statute.** Where a railroad corporation, relying on the presumption that a statute is constitutional, pays money into court, files exceptions, and takes possession of land, such acts are to be taken as a *whole* and not by *piecemeal*, not valid in part and void in part, and if the statute turns out to be unconstitutional, no estoppel will arise against such corporation in consequence of complying with the statutory terms.

Error to St. Louis Court of Appeals.

REVERSED.

Noble & Orrick and *John O'Day* for plaintiff in error in this case, and for respondents in the next succeeding case.

(1) Mandamus is not the proper remedy to correct an error, if error there was in this cause. The court below acted judicially in all matters pending before it, and it is not in the power of this court to review that action by mandamus. *Railroad v. Lackland*, 25 Mo. 527; High on Extraordinary Remedies, secs. 156, 176,

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177. Even when the court below refuses to act on the ground of the unconstitutionality of a statute, and when the superior court decides the law to be constitutional. *Smith v. Judges*, 17 Cal. 547. (a) The question of right of appeal can be determined on the appeal, and mandamus will not be granted. *Blecker v. St. Louis Law Com'rs*, 30 Mo. 112; *Gale v. Richie*, 47 Mo. 326; *State v. Lewis*, 76 Mo. 370; *Ex parte Ry. Co.*, 60 N. Y. 112; *Boller v. Voorhiss*, 20 N. Y. 525. (b) The appeal existing, a supersedeas is granted by law. R. S., 1879, secs. 3713, 3717, 3718; *State ex rel. v. Lewis*, 76 Mo. 370. (c) The supersedeas order was *judicial action* and the jurisdiction to make it will be examined only on appeal. High on Extraordinary Remedies, secs. 156, 176, 177; *Strong v. Jay*, 2 El. and Bl. 739; *Vandever v. Conover*, 1 How. (N. J.) 271; *Postmaster v. Trigg*, 11 Peters 173; *People v. Weston*, 28 Cal. 639; *People v. Judges*, 4 Nev. 119; *Dunklin Co. v. Dunklin Co. Court*, 23 Mo. 449. Mandamus does not lie to vacate order. *People v. Judges of Oneida Co.*, 21 Wend. 20. Nor to change venue. *State v. Washburne*, 32 Wis. 99; 2 Cowen 458. The discretion of staying proceedings will not be controlled by mandamus. *Louisiana v. Judges*, 15 La. 521; *People v. Superior Court*, 19 Wend. 701; *Elbert v. Judges, etc.*, 3 Cow. 59. (d) The clerk is not amenable to mandamus when the court has made the order. *State v. Engleman*, 45 Mo. 27. (e) And the court is not amenable to mandamus when it has already acted. High on Mandamus, *supra*. (2) On the merits shown on the record the writ should not be granted, because on the record the court below had jurisdiction and decided rightly. (a) The statute gives the railway company the right to except to the reports of the commissioners, and to a hearing on its exceptions, and if these exceptions are overruled, and a final order of payment is made, an appeal lies as in ordinary cases, with a supersedeas, if asked, as provided for under the statutes. *State ex rel. v. Lewis*, 76 Mo. 370; R. S., 1879, secs. 894, 896,

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as to report and exceptions; secs. 3710, 3712, 3713, 3717, 3718, as to appeals and supersedeas; *Railroad v. Lackland*, 25 Mo. 527; *Hudson v. Smith*, 9 Wis. 122; *Lee v. Railroad*, 53 Mo. 178; *Railroad v. Schaubacher*, 49 Mo. 555; *Mississippi River, etc., Co. v. Ring*, 57 Mo. 491. (b) If the payment of the money into court is made during the progress of the hearing of the exceptions, it does not belong immediately to the owner of the land if the railway company does not occupy the land, and the proceedings on final decision by appeal and supersedeas would be as before. (c) The statute authorizes payment into court as a deposit, filing of exceptions, and, pending the exceptions, gives the right to the company to build the road, authorizing its temporary occupation for this purpose, the fund to remain in court. R. S. 1879, sec. 896; *State v. Dickson*, 3 Mo. App. 467; *Mississippi, etc., Co. v. Ring*, 57 Mo. 491. (3) The statute under this construction is constitutional. Const. of Mo., 1875, art. 2, sec. 21; R. S., secs. 894, 896; 1 R. S. 1855, 419; Const. of Mo. 1820, art. 13, sec. 7; Const. of 1865, art. 1, sec. 16; 1 Wag. Stat., 328; *Walther v. Warner*, 35 Mo. 277; *Peterson v. Ferreby*, 30 Iowa 337; *Bloodgood v. Railroad*, 18 Wend. 9; *Baker v. Johnson*, 2 Hill 342; *Smith v. Helmer*, 7 Barb. 416; *Rubottom v. McClure*, 4 Blackf. 505; *Pittsburg v. Scott*, 1 Pa. St. 309; *Cushman v. Smith*, 34 Me. 247; *Miss., etc., Co. v. Ring*, 57 Mo. 496; *Bradshaw v. Johnson*, 20 Johns. 103; *People v. Hagden*, 6 Hill 359. As to compensation to be provided, see *Pierce on Railroads*, 161, 163, as to time when compensation must be made, the distinction between "taking" and "occupation," p. 171. The title must vest before the proceedings are ended, or beyond the control of the legislature. *Blackshaw v. Co.*, 13 Kansas 514; *C. B., etc., Co. v. A. T. etc., Co.*, 28 Kansas 454; *N. Y., etc., Co.*, 60 N. Y. 120; *Stacy v. R. R. Co.*, 27 Vermont 39; *Mereno v. Co.*, 11 C. E. Green, 464. The Ohio cases depend upon the statute, and even they allow the money to remain in court when a new trial is

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allowed. In *Meily v. Zurmehly*, 23 Ohio St. 631, it appears *no new trial was granted*, or the money would have remained in court, and possession would have been authorized but for the fact that the law of 1872 had expressly repealed the law of 1852, which had been in force for twenty years, and which had authorized possession, pending proceedings in error, and *while money was in court*. In *Wagner v. New York, etc., R. R. Co.*, 38 Ohio St. 32, it was merely decided that the statute did not authorize payment before judgment—and there was no judgment. Yet in that case, even if the money were the land owner's, the court held either party might prosecute error and reverse the judgment. It moreover is based on the last preceding case, which we have just seen rests in the new statute. (4) If the payment into court, pending exceptions, did not in other cases entitle the defendant to the fund, the right to it was not acquired by the subsequent occupation of the premises by the railway company. Such occupation was neither by order of court, by agreement, nor was it waiver. It was authorized by statute, pending exceptions and for further proceedings. R. S., 1879, sec. 896; *Peterson v. Ferreby*, 30 Iowa 337. It is a gross misconstruction of the railway company's acts and statements in court that it had taken possession, by virtue of these proceedings, before and without any order of court in relation thereto, to hold this was a waiver of exceptions, and the same in legal effect as payment by a defendant of a money judgment duly rendered against him. (5) The court had no authority to strike out the exceptions because of any act of the railway company, and it had a right to allow a supersedeas on final decision, not only under the general law, but in the present proceeding especially. R. S., 1879, secs. 896, 3718. (6) [a] Eminent domain or the power of the sovereign to condemn private property for public use is an inherent power in the state to be exercised as the legislative department of government deems best, subject only to constitutional restrictions. The prin-

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ciple which provides that private property shall not be taken for public use without compensation was one which existed at common law. It has been embodied in the constitution of every state in the union in some form; but without this incorporation into the constitution the right of the property holder to compensation would be secure and inviolable. Under the general principles of law applicable to the proceedings to condemn land, the appeal vacates and supersedes the finding or report of the commissioners, and the finding being vacated, the amount of damages is not fixed, and cannot be until the final determination of the appeal; hence, until that time the property holder cannot receive his compensation, as it has not been determined, and the occupation of his premises by the authority of the legislature is simply provisional, and is not in conflict with the provision of the bill of rights, which says that his property shall not be taken for public use without just compensation, and that after such compensation is ascertained, the property shall not be damaged, or the proprietary rights of the owner therein divested, until the same is paid to him. The occupation, disturbance and damage prohibited by the constitution until payment is first made, is such as the land owner sustains by the proceedings, resulting in finally appropriating his property to public use, and not the damage which he may sustain in consequence of a provisional occupation, authorized by the statute, pending the final determination and ascertainment of the damages which he will sustain by the appropriation of his land for the purpose for which it is sought to be taken. The words "payment into court," mean for *security*. *Blackshire v. Railroad*, 13 Kansas, 514; *Railway Co. v. Railroad Co.*, 28 Kansas, 454; *Railroad v. Callahan*, 13 Kansas, 494; *Tracy v. Railroad*, 80 Ky. 259; *Jackson v. Winn*, 4 Littell, 323; *Gashweller v. McIlvoy*, 1 A. K. Marshall, 61. (b) If the statute is void, all acts under it are void, and the owner cannot possibly acquire a right to

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the money because of the deposit intended and directed for an entirely different purpose. (7) [a] If any part of article six of chapter twenty-one, Revised Statutes, is void, because in conflict with the constitution, the entire statute is null and void. This court has held it is to be considered as a whole. 49 Mo. 455; 57 Mo. 491. (b) If all the provisions are so dependent upon each other, and operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed the legislature would have passed the one without the other, the whole statute is unconstitutional. Cooley on Constitutional Limitations, 178, 179; *Commonwealth v. Hitchings*, 5 Gray, 485; *Warren et al. v. Mayor, etc.*, 2 Gray, 84. (c) While it is undoubtedly true that a statute may be constitutional in part, and unconstitutional in part, yet as a general proposition it has its limitations. *Railroad Co. v. Railway Co.*, 28 Kansas, 458. (d) If the parts of the statute are so mutually dependent upon each other as to warrant the belief that the legislature intended them as a whole and that all should be carried into effect, then if some parts are unconstitutional, all parts which are thus dependent or connected must fall. Cooley on Constitutional Limitations, 179; *Warren et al. v. Mayor, etc.*, 2 Gray, 84; *Stauson v. City of Racine*, 13 Wis. 398; *Campan v. Detroit*, 14 Mich. 272; *State v. New Brunswick*, 9 Vroom, 320; *State v. Hudson Co.*, 8 Vroom, 12; *State v. Emcion*, 33 La. Ann. 253; *Mesheimer v. State*, 13 Ind. 486; *Washington v. State*, 8 Eng. (Ark.) 163; *Eason v. State*, 6 Eng. (Ark.) 481; *Lathrop v. Mills*, 19 Cal. 529; *People ex rel. v. Copper et al.*, 83 Ill. 595; *Hinze et al. v. People ex rel.*, 92 Ill. 424; *State v. Commissioners*, 5 Ohio St. 497; *State v. Milwaukee*, 25 Wis. 339; *Reed v. Railroad*, 33 Cal. 212.

Dyer, Lee & Ellis for defendants in error.

(1) Where the sole controversy is as to the right of

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appeal or writ of error it may be raised in the appellate court by motion to dismiss. Where the record discloses no right to appeal, or writ of error, the exercise of the right may be challenged by motion to dismiss. A party cannot appeal from a judgment after having accepted the fruits of it. *Robards v. Lamb*, 76 Mo. 192; *Cassell v. Fagin*, 11 Mo. 207; *Chase v. Williams*, 74 Mo. 429, 477; *Kinealy v. Macklin*, 67 Mo. 95. It is because the payment or acceptance or other act is voluntary, that its effect cannot afterwards be disputed by appeal. Thus, where one takes a voluntary non-suit, no appeal or writ of error will lie. *Plank Road Co. v. Mitchell*, 20 Mo. 432. A party cannot come into court and confess judgment in favor of another and then appeal from it. So a party cannot appeal from a judgment in his own favor. 67 Mo. 97; 3 Bacon's Abr. Er. (K.) 4, p. 373, Bouv.'s Ed.; 5 Co. 39 B., Moore, 74. Voluntary payment of judgment is waiver of right of appeal. *Railway v. Graham*, 4 Abb. Pr. 468. The judgment has a double aspect, being for the land, in favor of the railroad company, and for the money in favor of the land owner. Neither party can accept that part in his own favor, and at the same time controvert the part adverse to him by appeal. *Bennett v. Van Syckel*, 18 N. Y. 481; *Vail v. Remsen*, 7 Paige, ch. 206. These cases hold that under such circumstances the appeal will, on motion, be dismissed, and that motion is the only proper remedy in such cases. This rule is peculiarly applicable to condemnation proceedings. *Railroad Co. v. Johnson*, 84 Ind. 420; *Railroad Co. v. Byington*, 14 Iowa, 571; *Borgalthaus v. Ins. Co.*, 36 Iowa, 250. The rule must be reciprocal. As one by accepting payment acquiesces in the judgment, so by voluntarily paying the judgment a like result must follow. *Ind. Dist. of Altoona v. Dist. Tp. of Del.*, 44 Iowa. Where the owner accepts the amount assessed he cannot afterwards controvert the right of the plaintiff, "nor is it material in such case that the judgment may have been erroneous and void." *Test v. Larsh*, 76 Ind.

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452, 460. (2) Section twenty-one of the Bill of Rights, in the Missouri constitution, where it says, "paid to the owner, or into court for the owner," does not mean secured to the owner. It has been held that nothing could be *compensation* short of actual payment. Cooley's Const. Lim. (4 Ed.) 702; *Chambers v. Railroad*, Sup. Ct. of Ga., 1883; 10 Am. & Eng. Railroad Cases, 376. Others conceded that the language might be satisfied by legislation; either securing the payment, or permitting payment subsequent to occupation and final ascertainment of damages. *Bonaparte v. Railroad Co.*, Baldwin C. C. 226; *Walther v. Warner*, 25 Mo. 277. The wants and necessities of the people influence and control courts in administering the law. If there be language of doubtful import, courts must look to the circumstances and condition of the people to find the meaning of the clause in question. *Judges v. St. Louis Co. Ct.*, 15 Mo. 23. At the date of the framing of our constitution in 1875, the provisions of constitutions of other states with reference to condemnation proceedings must have been read by its members. The legislature of New Jersey enacted that in case any company should appeal from the finding of the commissioners appointed to appraise and assess, then the company might deposit the amount of damages in court, and forthwith enter on the lands condemned. This was held unconstitutional and void. *Redman v. Railroad Co.*, 33 N. J. Eq. 165; *Pearson v. Johnson*, 54 Miss. 259; *Chambers v. Railroad Co.*, 10 Am. & Eng. Ry. Cases, 376; *Norristown Tpk. Co. v. Burket*, 26 Ind. 53, 57; *Graham v. Railroad Co.*, 27 Ind. 260; *Sidener v. Norristown Tpk. Co.*, 23 Ind. 623; *Railroad Co. v. Grady*, 6 Ky. 144. Compensation is payment for a compulsory purchase. Cooley Const. Lim. (4 Ed.) 699. The words "pay into court for the owner" mean the legal and beneficial equivalent of actual payment to the owner. *Blanchard v. City of Kansas*, 16 Fed. Rep. 444; Mills on Eminent Domain, sec. 76. Courts should require the full performance of all conditions to the exercise of the

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right of eminent domain. 2 Dillon on Mun. Corp. (2 Ed.) 469; *Evans v. Railroad Co.*, 64 Mo. 463. The land should either be the owner's, or he should be paid for it. Cooley's Const. Lim. (4 Ed.) 704. (3) The right of the company to appeal and *supersedeas* in this case is not given by the constitution; the right of the land owner to the money is. The constitution is the higher law, and must be obeyed. Its terms are self-enforcing, and need no legislation. *Fusz v. Spaunhorst*, 67 Mo. 256. Revised Statutes, section 896, under which the railroad company claims the right to proceed to construct its road, pending exceptions to the report, was enacted before the adoption of the present constitution. The right of possession may be taken away, and the statute still be operative in behalf of the land owner. "An intent to repeal will not be assumed, if any other construction can be given to the subsequent act." *State v. Draper*, 47 Mo. 29. But this rule loses some force when the subsequent act professes to be, to some extent, one of repeal, as does section one of the schedule of our constitution. The object in view is not to reconcile the constitution with the statute, but the statute with the constitution. *Wagner v. Railroad Co.*, 10 Am. & Eng. R. R. Cases, 384; Bish. on Stat. Crimes (2 Ed.) sec. 152. (4) Where the money is in the court as a payment, or as a security for the land owner, he is, in either event, entitled to it; in the one case because it is his property, and in the other because it is the only kind of security which the land owner is required to accept. He cannot be compelled to look to a *supersedeas* bond instead of the money. For this reason the order of *supersedeas* should be vacated. Even in those states where the constitution only requires the money to be "paid or secured," this construction prevails. *Meily et al. v. Zurmehly*, 23 Ohio St. 627; *Wagner v. Railroad Co.*, 10 Am. & Eng. R. R. Cases, 384; *Rudesill v. State ex rel. Bird*, 40 Ind. 485, 490.

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Klein & Fisse and Smith & Krauthoff for The Missouri Fire Brick & Clay Company and Austin R. Moore, trustee.

(1) The *supersedeas* indorsed upon the writ of error in this cause is in contravention of the constitutional rights of the defendants in error. Const. of Mo. 1875, art. 2, sec. 21. Payment is required to be made, not a mere deposit by way of security. The money, when paid, becomes *eo instanti* the property of the land owner, being the equivalent or compensation for his land. A *supersedeas* cannot be lawfully granted to prevent the owner from receiving his own. The railroad company, having paid the money, has parted with all right to it and is not in position to litigate over the ownership of it. (2) The writ of error sued out in this cause should be dismissed. (a) Under our form of procedure, the office of the writ of error is not different from that of an appeal. The appeal is granted upon an affidavit that the appellant is aggrieved. R. S., sec. 3710. The writ of error is a writ of right under the statute. R. S., sec. 3743. But "it is a general rule that no person can bring a writ of error to reverse a judgment, who was not party or privy to the record, or prejudiced by the judgment, and, therefore, to receive advantage from it." Tidd's Practice (3 Am. Ed.) *1135; 3 Bacon's Abr. (Bouvier's Ed. 1876), 330, Title Error, B. "The object of a writ of error being to redress an injury which the complainant has sustained by the error of the court it can be brought only by the party who has been aggrieved by the judgment." *Alling v. Shelton*, 16 Conn. 436; *Howse v. Judson*, 1 Fla. 133; *Townsend v. Davis*, 1 Ga. 495; *Tey's case*, 5 Rep. *38; *Medina v. Stoughton*, 1 Ld. Raym. 593; *William v. Gwyn*, 2 Saund. R. 42, o, case 4, at p. 46, b. c. n. (6); *Hughes v. Stickney*, 13 Wend. 280; *Kinnealy v. Macklin*, 67 Mo. 95. (b) The plaintiff in error is not aggrieved by the order of the court of appeals dismissing

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the appeal in this case. (c) Not only is the plaintiff in error not aggrieved, but it has voluntarily acquiesced in the award of the commissioners by paying the money into court for the defendants in error, and it has also taken and retains the full benefit of the proceedings, and can only justify its act in taking possession of and disturbing the land of the defendants in error, by virtue of the validity of all prior acts and proceedings in this cause. (d) It is a rule of universal application, founded on natural justice, that whenever a party has accepted and retains the benefit of a proceeding or transaction, whether in or out of court, he will not be permitted to assail that part thereof which is against him, or repudiate or endeavor to invalidate the same. (3) Thus, if a party causes execution to be issued on a judgment in his own favor, and voluntarily collects the judgment, this is held to be a release of all errors against him, and he is estopped to afterwards reverse the judgment or decree on error or appeal. *Cassell v. Fagin*, 11 Mo. 207; *Robards v. Lamb*, 76 Mo. 192, 194-5; *Fly v. Bailey*, 36 Tex. 119; *Knapp v. Brown*, 11 Abb. Pr. (N. S.) 118, 122; *Bennett v. Van Syckel*, 18 N. Y. 481; *Murphy's Heirs v. Murphy's Adm'r*, 45 Ala. 123; *Chapman v. Lee*, 51 Ala. 106; *Shinkler v. Martin*, 54 Ala. 354; *Ind. Dist. of Altoona v. Dist. Tp. of Delaware*, 44 Iowa, 201. (4) Or if he accepts the benefits of a decree, judgment or proceeding of any nature, which is made to depend on the performance of any act or thing by him, or upon conditions as to him, he cannot, while holding on to such benefits, controvert or seek to overthrow that part thereof which militates against him. *Austin v. Loring*, 63 Mo. 19, 23; *Chase v. Williams*, 74 Mo. 429, 437; *The Miss. & Mo. Ry. Co. v. Byington*, 12 Iowa, 57; *B., Q. & C. Ry. Co. v. Johnson*, 84 Ind. 420; *Tey's case*, 5 Rep. *p. [38] at p. *40; *Officer v. Price*, 5 Yerg. (Tenn.) 285; *Smith v. Jack*, 2 W. & S. 101; *Smith v. Worden*, 19 Pa. St. 424, p. 430; *Lacy v. Hall*, 37 Pa. St. 366; *Radway v. Graham*, 4 Abb. Pr. 468; *Bennett*

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v. Van Syckel, 18 N. Y. 481; *Clarke v. Meigs*, 10 Bosw. 337; *Glackin v. Zeller*, 52 Barb. 147; *Marwin v. Marwin* [No. 1] Court of App., 11 Abb. Pr. (N. S.) 97. (5) So in this case, the plaintiff in error is in this position: It assumed the report of the commissioners to be valid and regular and made the payment into court, and took possession of the property. Unless the report of the commissioners was regular and valid as to the railroad company, it had no right to pay the money or to take possession. It seeks now to have that declared to be invalid on the validity of which all its rights in the premises depend. This court will not permit a party to take advantage of his own wrong in such a manner. The railroad company has invoked the statute, and cannot be permitted to plead that it is void. A party who has received the benefit of a statute, is precluded, by his action, from contesting its validity. *Cooley's Const. Lim.* (5 Ed) 181; *People v. Murrery*, 5 Hill, 468; *Wellington et al. Petitioners*, 16 Pick. 87, p. 96-7; *The People v. Brooklyn, F. & C. I. R. Co.*, 89 N. Y. 75, pp. 92, 94; *Matter of the Application of Cooper*, 93 N. Y. 507, pp. 511-12; and see *Bigelow on Estoppel* (3 Ed.) 571, 573.

SHERWOOD, J.—The case is this: On the eighth of June, 1883, the St. Louis and San Francisco Railway Company filed its petition to have certain lands, belonging to the Evans & Howard Fire Brick Company and the Missouri Fire Brick & Clay Company, condemned for the use of the railway company, under the statute in such case made and provided. The defendant, Austin R. Moore, was made a party merely as a trustee in a deed of trust made by the last named defendant to secure one of its debts. Summons was issued the same day, and duly served; and on July 6, three commissioners were appointed to assess the damages. On the twenty-second day of August, the commissioners filed two reports; two of the commissioners assessing the damages of the Evans & Howard Company at \$50,000,

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and the other commissioner assessing them at \$4,000; and two also assessing the damages of the Missouri Fire, etc., Company at \$25,900, the third commissioner placing the amount at \$12,000. On August 23, 1883, notice was given of the filing of the reports, which was served on the twenty-seventh, and on the thirtieth of August the railway company filed its exceptions to the reports of the commissioners, and on the same day paid to the clerk of the court the amount of the damages assessed to the several companies. The exceptions were in part based on the grounds that the award of the commissioners was largely in excess of any fair or just compensation for the damages which would be caused by the construction of plaintiff's road, and that the damages assessed were imaginary and speculative. On September 17, the parties appeared, and the railway company moved to have its exceptions to the report heard; the defendants moved for payment to them of the amounts paid the clerk, and thereupon the motion of plaintiff for hearing of exceptions being submitted to the court, and the plaintiff then, in open court, admitting that since making the payments to the clerk of the court, and in virtue of such payments for the defendants, it had taken possession of the property of said defendants described in the petition and the report of commissioners herein, the court overruled said motion for hearing of plaintiff, and struck out the exceptions aforesaid.

The court sustained the motions of defendants and ordered the clerk to pay over to the defendant companies the several sums assessed and theretofore paid into the court. The railway company immediately filed its motions to set aside said orders of payment and the order striking out the exceptions, and for a re-hearing of said matters, and these motions were then and there overruled. Again, on the eighteenth of September, the railway company filed its motion for re-hearing as to awards, and this was overruled. To all of these several acts of the court, exceptions were duly preserved. Nothing

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more having in the meantime appeared of record, on September 19, the bill of exceptions was filed, and the railway company filed its affidavit and application for appeal, and the appeal was allowed. Thereupon the railway company filed its several appeal bonds, one in the sum of \$110,000 for the Evans & Howard Company, and one for the Missouri Company in the sum of \$55,000; these were approved by the court. Thereupon the defendants severally demanded the delivery of the several sums paid by the company into court. This demand was refused by the court, on the ground that the appeal bond operated as a stay of the payment of said money; and the court, of its own motion, further directed, that pending the appeal, said sums of money should be retained by the clerk for investment or safe keeping, as the court might thereafter direct. This appeal was, under the law, returnable to the March term of the St. Louis court of appeals. On the first day of that term the defendants united in a motion to dismiss the plaintiff's appeal, and this motion was sustained by the court of appeals. The present writ of error was then sued out, and an order of *supersedeas* obtained, the plaintiff filing in this, the Supreme Court, its appeal bonds for the several defendants in respective sums, more than double the assessments, and with approved sureties.

This being the state of facts presented by this record the defendants have moved to vacate the order of *supersedeas* and to dismiss the writ of error. These motions will now be considered, and in considering them I deem it best to consider not only the action of the court of appeals in dismissing the plaintiff's appeal, in consequence of which this writ of error was sued out, but also to consider the merits of the controversy. Indeed, the merits of the controversy are so closely interwoven with the merits of these motions, that the discussion of the one involves to a considerable extent the discussion of the others.

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Section 3710, Revised Statutes, 1879, provides that: "Every person aggrieved by any final judgment or decision of any circuit court in any civil cause, or by any such judgment or decision of the St. Louis court of appeals * * * may make his appeal to the court having appellate jurisdiction of such judgment or decision." This court has ruled in *State v. Lewis*, 76 Mo. 370, that under the provisions of that section and of section 3713, an appeal with a statutory bond would operate as a *supersedeas*, where the judgment appealed from awarded a peremptory *mandamus*, and that those statutory provisions, subject to the conditions contained in those sections, apply to *every civil cause*, no matter what the judgment may be, and that consequently proceedings by *mandamus* were included within those provisions. And writs of error, under section twelve of article six, of the constitution, are authorized to issue from this court to the St. Louis court of appeals—in all cases involving the construction of the constitution of this state, etc. Section fifteen of the same article provides that, "All laws relating to practice in the Supreme Court" shall apply to the St. Louis court of appeals, etc. And section 3743, Revised Statutes, 1879, declares that writs of error are writs of right, and shall issue, of course, out of the Supreme Court to the circuit court in vacation as well as in term, etc. And §§ 3756, 3757, 3758, 3759, make provisions whereby a writ of error may be sued out, and that a bond may be given under similar conditions and with similar effect as in ordinary cases of appeal. While section 3785, a new section, carries into effect the constitutional provision aforesaid by providing that the provisions of "the chapter regulating the practice in the Supreme Court, shall apply to practice in the St. Louis court of appeals. * * * And all cases taken to or from the St. Louis court of appeals by appeal or writ of error shall be governed by the provisions of this chapter, regulating the taking of cases by appeal or writ of error to the Supreme Court," etc. And the laws of 1888,

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page 111, amending section 3126, Revised Statutes, 1879, when considered in connection with other statutory provisions already noticed, fully authorizes a judge of this court, when it has adjourned for more than one day, to inspect the record in a cause and to allow a writ of error to stay execution upon the usual terms. The order in this cause made by the circuit court was a final order, upon which an appeal or writ of error would lie.

Our reports furnish frequent instances where appeals have been taken in condemnation proceedings. *Railroad Co. v. Lackland*, 25 Mo. 527; *Hannibal Bridge Co. v. Shaubacher*, 49 Mo. 555; *Ring v. Miss. Bridge Co.*, 57 Mo. 496; *Railroad Co. v. Campbell*, 62 Mo. 585. The appeal was taken in the circuit court from the action of the court in striking out the plaintiff's exceptions, and the order of the court that the clerk pay over to the defendant companies the sums assessed and paid into court. At an early day in this state it was held a writ of error would lie to the action of the trial court upon a motion requiring a sheriff to pay over money in satisfaction of an execution. *Wise v. Darby*, 9 Mo. 132. To the same effect are *Slagel v. Murdock*, 65 Mo. 522, and cases cited. And the dismissal of the appeal of plaintiff by the court of appeals was, also, a final order or judgment from which an appeal will lie, or which will authorize a writ of error to issue. *Matter of N. Y. Cent. & H. River Railroad Co.*, 60 N. Y. 112; *Pearson v. Lovejoy*, 53 Barb. 407; *Hammond v. Carpenter*, 29 How. Pr. 43. And it is apparent from an inspection of the records and of these motions, and of the action and opinions of the court of appeals, both in the present case and the *mandamus* case, which has been argued in connection with this one, that the questions at issue do involve a construction of the constitution of this state, and, therefore, this cause, aside from other considerations, falls within our appellate jurisdiction. But it is strenuously urged, in support of the motion to dismiss the writ of error, that such writ can only be brought by

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one who has been "*aggrieved*" by the judgment. Just this position was taken by the court of appeals when it dismissed the appeal of plaintiff, citing in support of its ruling *Kinealy v. Macklin*, 67 Mo. 95.

It is doubtless true that a party, under the terms of the statute, is not entitled to an appeal unless "*aggrieved*" by the judgment (R. S., 1879, sec. 3710), *i. e.*, that a party cannot appeal from a judgment altogether in his own favor, and the same rule holds as to suing out writs of error. This was *Kinealy's case*; he obtained judgment of reversal in general term and then appealed therefrom, not because there was any error committed against him, but because general term did not go further and enter an affirmative judgment in his favor. Here, however, the very point in dispute is whether the plaintiff is aggrieved or not; whether a judgment can be truly said to be *in favor* of a party against whom it goes, compelling it to pay, if the minority report be correct, \$50,000 to one of these defendants, where in common fairness and common honesty but \$4,000 should be paid. Such a wide difference in valuations, would seem to argue either gross ignorance, or else gross partiality, and there seems no escape from one or the other of such distasteful conclusions. On a former occasion where commissioners, appointed to appraise property for railroad purposes, had disregarded their duties, and had assessed the damages in favor of the land owner at an excessively large sum, this court pointedly rebuked the commissioners for dereliction of duty and reversed the judgment. *Railroad Co. v. Campbell*, 62 Mo. 585. So that, on this portion of the cause, the plaintiff may, with much force of reason, say that it is not greatly benefited or favored by the action of the trial court, which refused to hear its exceptions, and yet ordered the money to be paid over to the defendants; money which was paid into the hands of the clerk under the very terms of the statute, and on the faith that those exceptions would be heard before any other step would

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be taken. Surely these circumstances attendant on the payment of the money to the clerk, give not the faintest token of acquiescence in the award of the commissioners. Construed as a *whole*, as all such transactions should be, they amount in their sum total but to this: that the railroad company was willing to take the land and to pay for it; to enter upon the land and to construct its road, reserving to itself, as under the statute it might lawfully do, the right to have tested and examined by the court, the question whether the full compensation, already beyond the control of the company, already in the hands of the court, already in *custodia legis*, was not more than "*just compensation*," for the land. Such acts on the part of the railroad company have about them no more of the similitude of waiver or acquiescence than similar acts on the part of the *land owner* in *Evans' case*, 64 Mo. 453, where he exhausted his statutory remedies in resisting the taking of his land for less than it was worth, and finally enjoined the railroad company until that it should pay him the damages allowed on the second assessment. Further comment on this branch of this case is unnecessary, and the motion to dismiss the writ should be denied.

I pass now to the consideration of the motion to vacate the order of *supersedeas*. It would seem necessarily to follow that if the writ of error was not improvidently issued, that the *supersedeas* indorsed thereon was but an incident to that "writ of right." And viewing the matter in this light, I might well pause here and refrain from discussing those matters which touch the heart of this cause; but inasmuch as under the ruling just announced the judgment should be reversed, because of the unwarranted action of the court of appeals in dismissing the appeal of plaintiff; and as those matters will have to be determined on the return of this cause, I deem it not improper to discuss them. Now, as to the order of *supersedeas* which defendants have moved to vacate: It is said that order is in contraven-

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tion of the constitutional rights of the defendants, and this declaration comprehends also the action of the circuit court in accepting a bond when granting an appeal. Let us examine this point: Section twenty-one of article two, of the constitution provides: "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, *in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested.*"

An eminent jurist and author speaking in regard to constitutional construction has said: "Every word employed in the constitution is to be expounded in its plain, obvious and common-sense meaning, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." 1 Story Const., sec. 451.

Taking this statement as one of the *criteria* of what is proper in constitutional investigations, let us consider the section of the constitution just quoted. In the first place, it would be doing violence to all known rules of interpretation to assume that those who framed and those who by their votes adopted our constitution, were actuated by no intelligent purpose in that behalf. On the contrary, it must be assumed that they were familiar

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with the vicissitudes incident to condemnation proceedings and with the statutory provisions relating thereto; familiar with the fact that sometimes the land desired to be taken is not appraised at a sufficiently large sum, and, therefore, the land-owner files his exceptions; familiar with the fact that sometimes such land is appraised and the damages of the owner assessed at an exorbitantly large sum, and, therefore, the corporation, desiring to appropriate the land, files its exceptions; familiar with the fact that contests arise on the hearing and trial of these exceptions, and that frequently appeals are taken by the unsuccessful party to the court of last resort, to the end that the litigated matter may be finally adjudicated; familiar with the fact that such appeals cause delay; familiar with the fact that it concerns the public welfare that the enterprise of railroad building should not be retarded, and cannot be retarded without injuriously affecting the interests and prosperity of large communities in this state; familiar with the fact that in order to determine what the land proposed to be taken is worth, and how much the owner of it will be damaged by the taking, an imperious necessity exists that the *precise strip of land* required, its dimensions, etc., should first be ascertained, and that such strip should be marked out and sufficiently designated in order that those appointed to appraise it and assess the damages accruing to the land owner, can intelligently perform their work after they shall have "viewed the property." Taking all these things into consideration, as must be presumed to have been done by the framers and adopters of our constitution, it does not seem difficult to reach a correct conclusion as to the meaning of the words employed. If the words, "paid to the owner, or into court for the owner," be taken in a *literal* sense, it cannot be doubted that the plaintiff company has brought itself within the very terms and letter of the organic law; the money has been "*paid * * * into court for the owner.*" But grant that the words are not to be taken

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literally, and the result is not changed, if they are to be taken in their "usual and most known signification" (1 Sto. Const., sec. 400), taken in the light of an intelligent purpose prompting those who used and those who adopted them. Viewed in this light, it is easy to discern the object contemplated by those who employed them and the reason they were employed. The very fact that they were employed, in and of itself, discloses a knowledge, on the part of the framers of the constitution, of the frequent necessity, arising in the progress of condemnation proceedings, of paying money "*into court for the owner*," there to await the ultimate determination of the suit. If these words are held to have this meaning, such meaning will not be a strained or forced one, but a meaning which, considering the surroundings of those who framed the organic law, and were doubtless aware of the law as it stood and of the force and effect of the words used, will be most obvious and natural.

It has been suggested, however, that "the clause permitting payment into court for the owner, was evidently intended as a provision for cases where the owner might refuse payment when tendered, or might be unknown or not *sui juris*." This view, so far as it goes, is in entire accord with the one already expressed; for the language is broad enough to cover every possible contingency which necessitates the payment of money into court, or its retention to abide the result of litigation. But that language cannot be restricted to the cases of a recalcitrant, unknown or not *sui juris* land owner. To narrow the language thus, to limit its scope to those particular instances alone, would not be warranted, were the words taken either in their literal or their ordinary sense. The reason which would thus restrict them is by no means apparent; and if the constitution will permit a railroad or other corporation to make a payment into court for an obstinate or unknown owner, or one not *sui juris*, and thereupon to enter on the land and construct its road, it is difficult to see why the payment of the

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money to the clerk in that case, attended, as it would be, with all the hazards of loss that it would in any other, from embezzlement or otherwise, is not as obnoxious to constitutional objections as though the payment were made as in the present case; made to await judicial action upon the exceptions filed in the cause, in order to have a judicial determination whether the amount allowed by the commissioners does not exceed that "just compensation" which the constitution so emphatically guarantees. That guaranty only extends over and only includes "just compensation" and no more, and was never intended to countenance arbitrary assessments or exorbitant exactions. To rule otherwise, to hold that the framers of the constitution were less solicitous of the rights of the money owner than they were of the land owner, is to impugn either their wisdom or their justice. It will have been observed, from the discussion heretofore had, that intimation has already been given as to the meaning of the words, "*the property shall not be disturbed*," etc. It must be quite obvious that these words are not to be taken in a *literal* sense, at least so far as concerns preliminary steps looking to the condemnation of property, because if such rigidity of meaning be attributed to them, it would be out of the power of a railroad, or municipal corporation, to take the necessary initiatory steps to ascertain *what* land would be required for the purpose in view. To this point of the investigation, therefore, the familiar maxim applies: "*Lex non intendit aliquid impossibile*." The reason of the law in such cases should prevail over its letter, and general terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence, the presumption being indulged that the law-makers intended exceptions to language which otherwise would lead to such anomalous results. *United States v. Kirby*, 7 Wall. 482; *People v. McRoberts*, 62 Ill. 38; *Fusz v. Spaunhorst*, 67 Mo. 256.

This point, however, has become measurably unim-

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portant, owing to the subsequent shape the proceedings instituted have assumed, but in any event, if the meaning I have ascribed to the words, "*paid * * * into court for the owner,*" be the correct one, the command of the constitution as to that point had been fully complied with prior to those things which gave origin to the appeal. It will have been observed, also, that the section of the constitution under discussion, declares "such compensation shall be ascertained by a jury or a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law." Since the adoption of the constitution, the general law on the subject of condemnation of land, has undergone revision, but virtually remains, in all essential particulars, the same as before. The sections of the statute referred to, material to be quoted, are as follows:

"Sec. 892. In case lands or other property are sought to be appropriated by any road, railroad * * * or other corporation created under the laws of this state, for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid * * * such corporation may apply to the circuit court of the county where said land or any part thereof lies, or the judge thereof in vacation, by petition, setting forth the general directions in which it is desired to construct their * * * railroad * * * over such lands, a description of the real estate or other property which the company seeks to acquire, the names of the owners thereof, if known, * * * and praying the appointment of three disinterested freeholders as commissioners, or by a jury, to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such * * * railroad * * * over such lands * * *"

Section 893 provides how summons shall be issued and served.

"Sec. 894. The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the

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petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, * * * to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return, under oath, such assessment of damages to the clerk of such court, setting forth the amount of damages; and should more than one owner be included in the petition, then the damages allowed each shall be stated separately, together with a specific description of the property for which such damages are assessed, and the clerk shall file said report and record the same in the order book of the court; and thereupon such company shall pay to the said clerk the amount thus assessed, for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid; and, upon failure to pay the assessment aforesaid, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the said company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land by an instrument in writing to that effect, to be filed with the clerk of said court and entered on the minutes of the court, and as to so much as is thus abandoned, the assessment of damages shall be void."

"Sec. 896. Upon the filing of such report of said commissioners, the clerk of the court wherein the same is filed shall duly notify the party whose property is affected, of the filing thereof; and the report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions, filed by either party in the clerk's office, within ten days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisement, upon good cause shown. Such new appraisement shall, at the request of

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either party, be made by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages; but, notwithstanding such exceptions such company may proceed to * * * construct said road or railroad; and any subsequent proceedings shall only affect the amount of compensation to be allowed. In all cases, arising under the provisions of this article, the report of commissioners, when signed by a majority of them, shall be taken and considered as the report of all."

As the legislature has revised the general law in regard to condemnation of land, it will be presumed that their attention was directed to the subject of the necessity of conforming that law to the constitutional provisions, and such revision must be regarded as a legislative construction of that section of the constitution under consideration, and that the general law is in conformity thereto. *Groves v. Slaughter*, 15 Pet. 449; *Fusz v. Spaunhorst*, *supra*. This legislative exposition is entitled to some weight, as the authorities show, and the courts may with some confidence repose upon the conclusions reached by the legislature (Cooley on Const. Lim. 219), and the statute, is to be viewed *pro hac vice*, in the same light as though the legislature had enacted a new statute in compliance with constitutional requirements, and had prescribed by law the manner in which the compensation for land taken shall be ascertained—by three freeholders, acting in the capacity of a jury or as commissioners. *Prima facie* this law is constitutional; *prima facie* it conforms in all essential particulars to the organic law, and the well known rule of construction applies here, that a statute is not to be presumed repugnant to the constitution, until such repugnancy is made to appear beyond a reasonable doubt. Vague conjecture and slight implication will not meet the requirements of this rule, and "as a conflict between the statute and the constitution is not to be implied, it would seem to follow where the meaning of the constitution is clear, *that the court if possible must give the statute such a construc-*

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tion as will enable it to have effect." Cooley's Const. Lim. 218, 219, 220.

After a very careful examination of the section of the constitution before quoted and a comparison of it with the statutory provisions already set forth, I have been unable to discover any necessary incongruity or repugnancy between the constitution and the statute. The statute must, therefore, on the grounds stated, be held *prima facie* valid, and that the manner which it prescribes for ascertaining the compensation to be awarded to a land owner as possessed of equal validity. The manner in which the jury or commissioners shall ascertain the *quantum* of compensation is left entirely to the legislature; that manner or method prescribed may well include all the necessary details of motions and exceptions to the insufficiency or the exorbitancy of the amount of damages assessed, and the appointment of new commissioners or another jury "as right and justice may require." There is certainly nothing repugnant to the constitution in prescribing such details; on the contrary, it is in furtherance of the constitutional mandate requiring that "just compensation" be made. This embraces all means necessary to that end, not inconsistent with the constitution. Nor is any incongruity apparent between the different sections of the statute. In *Ring v. Mississippi Bridge Company*, 57 Mo. 496, it was ruled that section 3, which now corresponds with section 894, and section 4, which now substantially corresponds with section 896, should be *construed together*, and that the corporation, having paid the money to the clerk for the owner, might still except; but notwithstanding such exceptions, having made full compensation, as aforesaid, might still proceed with the construction of the road and the subsequent proceedings would only affect the amount of compensation to be allowed. It is, perhaps, unnecessary to say, at present, what force and effect are to be given to the last clause of section 894, *supra*, in relation to issuing execution against the corporation for the dam-

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ages assessed. It seems to be an independent clause, a cumulative remedy, and the owner is not called upon to rely on it for his compensation; that is secured to him in another way.

The clause rather seems intended as a spur to the diligence of the company, compelling an election in writing within ten days after the return of the assessment, whether the proposed appropriation of the land shall be abandoned, and in default of such written election within the designated time, that then execution shall issue for the amount assessed. Sometimes a statute is unconstitutional in part and constitutional as to the residue, and if the unconstitutional part is not inseparably connected in substance with that which is valid and complete in itself, and capable of being executed in conformity with the apparent legislative intent, regardless of that which is rejected, the unconstitutional part may be regarded as stricken out. Cooley's Const. Lim. 211, 212. As this clause is apparently an independent one, not necessary to the complete enforcement of the other provisions of the statute, it is not thought that it affects the validity of the other provisions. But granting that the *whole* statute on the subject under consideration is constitutionally invalid, what then? Are the rights of the plaintiff to be sacrificed on the altar of *mistake*? Is it to suffer because it has in all confidence relied on the validity of a statute, with whose terms and provisions it has made literal and exact compliance? I hold not. To hold differently would be to make the statute, itself, a *pitfall and a snare*. It seems to have been thought that the plaintiff having paid its money into court for the owner, having filed its exceptions to the exorbitancy of the damages assessed against it, and then taken possession of the land in compliance with the statute, under the belief that its exceptions would be heard, and that the court, doing what right and justice would require, would so reduce the unwarranted amount assessed that it would fall within the limits of "just

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compensation" is in some way *estopped* from asserting its rights, as expounded in the statute and in the constitution. It is sufficient to say that if the statute be invalid "the doctrine of estoppel is totally inadmissible in the case." *South Ottawa v. Perkins*, 94 U. S. 260; *State v. Railroad*, 31 Ark. 701. If, on the other hand, the statute is valid, it is so because it conforms to the constitution. So that in either case the rights of the plaintiff will not be jeopardized.

The statute authorizes "*either party*" to file exceptions, and the plaintiff company had the unquestionable right to rely upon that statute as valid so far as taking any steps which the statute authorized. And all the steps taken by it are to be viewed as a *whole* and not by *piecemeal*; the payment of the money and the taking possession of the land are to be considered in connection with the exceptions then on file. *Ring v. Bridge Company*, *supra*. The act of the plaintiff company cannot be severed in this way, made valid in part and void in part; void in so far as it works in its favor, and valid in so far as it works against it.

I have deemed it unnecessary to quote from or notice in this opinion, the great array of authorities cited by counsel. Many of them, owing to different constitutional and statutory provisions, and the different circumstances under which the various cases arose, have but little, if any, bearing upon the case at bar. I will, however, notice a few of them. The case of *Meily v. Zurmehly*, 23 Ohio St. 627, only turns upon the breach of the bond of the probate judge, by the retention of the money in his hands paid to him as the result of certain condemnation proceedings. Under the old law he would have had the right to have retained the money pending the appeal—but under the new law of 1872, he had no such right unless a new trial were granted, and there was none granted, and for this reason alone, his retention of the money was unwarranted, and constituted a breach of the conditions of his bond. But no question

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was made in that case as to the validity of the old statute which allowed the corporation to pay into court the amount of the judgment and then to enter upon and appropriate the property, notwithstanding the pendency of proceedings in error. And the constitution of Ohio, on this point, is a literal copy of that of Kansas, with the exception of the word "first" occurring just before the word "secured." The case of *Wagner v. Railway Company*, 38 Ohio 32, is no more in point; the question there being, as Johnson, J., states, whether property condemned could be appropriated by paying the amount into court required by the verdict, unless a judgment were rendered on that verdict, and it was ruled a judgment was necessary; and, besides, the statute in that instance gave no right to appropriate the property pending the second trial. The case of *Redman v. Philadelphia Railroad Company*, 33 N. J. Eq. 165, was one where the constitution in express terms declared that "individuals, or private corporations, shall not be authorized to take private property for public use without just compensation first made to the owner." And it was very properly held that a statute which authorized a payment of money "into court," was not in harmony with the constitution. But in Iowa, where the constitution provides that "private property shall not be taken for public use without just compensation first being made or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury," under a statutory provision similar to our own as to taking possession of the land and constructing the road upon payment "to said sheriff for the use of said owner," and under which provision either party had the right to appeal from the assessment, it was ruled the statute was constitutional, Day, J., remarking: "The property is not taken, in an absolute sense, until the amount assessed upon appeal is paid. If the appellate jury, in this case, shall assess less than the sheriff's jury have assessed, the amount is secured to the plaintiff, being in the sheriff's

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hands; if they shall assess more, the plaintiff can, by injunction, prevent the absolute appropriation of his property, until the increased sum be paid. *Richard v. Des Moines, etc., Railroad Company*, 18 Iowa, 260. In either event, the land owner is fully protected. We are clearly of the opinion that the money paid the sheriff should remain a deposit in his hands, until the damages are finally assessed in the appellate court." *Peterson v. Ferreby*, 30 Iowa, 327.

So, also, in Kansas, the constitution provides: "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money or secured by a deposit of money, to the owner." The statute there is substantially like our own as to taking possession of the land by the corporation and constructing its road, notwithstanding the amount assessed as damages is in litigation, and Brewer, J., in an elaborate opinion, speaking for the court, reviewed all the prior cases in that state, and held the statute valid, remarking, in conclusion: "We have given this question the fullest consideration, and our conclusion upholds the validity of this statute. We think the constitutional guaranty has been satisfied by it, both in letter and in spirit; that the rights of the land owner are protected, and at the same time no unreasonable obstruction placed in the way of railroad enterprises." *C. B. U. P. Ry. Co. v. A., T. & S. F. Ry. Co.*, 28 Kansas, 453.

It only remains to say that for the foregoing reasons the judgment should be reversed and the cause remanded in order to be proceeded with in conformity with this opinion. All concur, except Norton, J., absent.

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THE STATE *ex rel.* THE EVANS & HOWARD FIRE BRICK COMPANY, *Appellant*, v. LUBKE, *Judge, et al.*

Mandamus: APPEAL. Mandamus will not lie to relieve against the acts of an inferior court, where the party complaining has a remedy by appeal or writ of error.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

This case grew out of and is an incident to the next preceding one, and was argued and submitted in connection with it. The statement of facts contained in the opinion of the court in that case will serve for this, with the further statement, that at the time the defendants filed their motion in the St. Louis court of appeals to dismiss the appeal in that case, the relator herein, The Evans & Howard Fire Brick Company, filed in the same court an application for mandamus against George W. Lubke, judge of the circuit court of the city of St. Louis, in which court the condemnation proceedings referred to in the preceding case were had, and the clerk thereof, asking an order to compel them to pay to relator the fifty thousand dollars awarded it by the commissioners, which sum was held by the clerk. The St. Louis court of appeals refused the mandamus and the relator appealed to this court.

Klein & Fisse and Smith & Krauthoff and Dyer, Lee & Ellis for appellant.

Noble & Orrick and John O' Day for respondents.

SHERWOOD, J.—The circuit court properly granted an appeal and *supersedeas* in the case of the St. Louis & San Francisco Railway Company, for the reasons given

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in that case. But whether that appeal was properly granted or not, does not affect the disposition to be made of this mandamus proceeding. Such a proceeding is not allowable where the party has a remedy by appeal or writ of error. *Blecker v. St. Louis Law Com.*, 30 Mo. 111.

The judgment of the court of appeals is, therefore, affirmed. All concur.

BUSH V. WHITE *et al.*, Appellants.

1. **Sheriff's Deed, Amendment of.** Where a sheriff's deed is defective, as in failing to state the date and amount of judgment, he has the right to make another deed and can do so after the expiration of his term of office.
2. — : **TITLE CONFERRED BY RELATION.** A sheriff's deed relates back to the date of the judgment lien and operates to transfer the title of the judgment debtor as of that date and the same is true of his amended deed.
3. **Execution.** A judgment creditor is entitled to an execution as a matter of course for the purpose of enforcing his judgment.
4. — : **STATUTE.** The act of the legislature of March 23, 1863 (Acts, p. 19) relating to executions, does not assume to restrict such judgment creditor in his right to such execution. That act relates only to the extension and revival of liens of unsatisfied executions and provides for a method of enforcing them by renewed execution without the necessity of a re-levy upon the property originally covered by them.
5. **Sheriff's Deed : RECITAL AS TO PLACE OF SALE.** A recital in a sheriff's deed that he made the sale at the court house, will be construed as meaning, especially after the lapse of a long time, that it was conducted at the lawful and customary place of making sales.
6. **Mortgageor, ACQUISITION BY OF OUTSTANDING TITLE.** Under the law as it now prevails in this state, a mortgageor occupies no such

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subservient relation to the mortgagee as to prevent him from acquiring an outstanding title against the mortgagee.

7. **Limitation: KNOWLEDGE OF MORTGAGEOR'S ADVERSE POSSESSION.** Nor is actual knowledge on the part of the mortgagee of an adverse holding of possession by the mortgageor necessary to start the running of the bar of the statute of limitations in favor of the former.
8. **Mortgage Lien: WHEN STATUTE OF LIMITATIONS BEGINS TO RUN AGAINST.** The statute of limitations begins to run against the lien of the mortgagee as soon as the right of action thereon accrues.
9. **Mortgageor's Absence from State: STATUTE OF LIMITATIONS.** The absence of a mortgageor from the state, occurring after foreclosure or the transfer of his interest in the mortgaged property, will not interrupt the running of the statute of limitations.

Appeal from Saline Circuit Court.—HON. JOHN P. STROTHER, Judge.

REVERSED.

Draffen & Williams for appellants.

(1) The court erred in excluding the sheriff's amended deed dated May 3, 1867, from B. H. Hawpe, sheriff, to Wm. H. Trigg, and the deed from Trigg to defendant, Wade. The first sheriff's deed being defective, it was the duty of the sheriff to make an amended one. *Thornton v. McKimmon*, 48 Mo. 219. The omission of the word "door" in the amended deed was simply a clerical error and was immaterial. *Strain v. Murphy*, 49 Mo. 337; *Buchanan v. Tracy*, 45 Mo. 437; *Davis v. Kline*, 76 Mo. 310; *Allon v. Sales*, 56 Mo. 28; *Wilhite v. Wilhite*, 53 Mo. 71; *Ellis v. Jones*, 51 Mo. 180; *Harnby v. Cramer*, 12 How. Pr. 490; *Warner v. Sharpe*, 53 Mo. 598; *Davis v. Peveler*, 65 Mo. 189. Besides, the deed was amendatory of the one made in 1865, and the latter showed the sale was made at the court house door and the defendant offered to show by parol evidence that it was in fact so made. *Moore v. Wingate*, 53 Mo. 398; *Gardner v. Tucker*, 61 Mo. 428; *Jones v.*

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Carter, 56 Mo. 403. The recitals in the deed in regard to the executions were sufficient. The statute does not require the execution to be set out in full or in substance in the deed. The names of the parties to the execution, the date when issued, the date of the judgment, etc., are given, and this is all that is required. 1 R. S., 1879, sec. 2392; *Stewart v. Severance*, 43 Mo. 322; *Groner v. Smith*, 49 Mo. 318; *Perkins v. Quigley*, 62 Mo. 498. (2) When the amended deed was made it related back to the day of the sale and the deed of Trigg and Stephens, whether one of warranty or quit-claim, carried the interest Trigg had acquired by his purchase under the sheriff's sale. *Mariner v. Porter*, 50 Mo. 364; *In re Quenzler*, 70 Mo. 39. (3) If the possession of Wade was not originally taken in subordination to the mortgage, but was hostile to it in its inception, then it was unnecessary for defendant to show that actual knowledge thereof had been brought home to Bryant. The rule in regard to the change from a friendly to an adverse holding would not apply. *Key v. Jennings*, 66 Mo. 356; *Miller v. Bledsoe*, 61 Mo. 96; *North v. Hammonds*, 34 Wis. 425; *Stevens v. Brooks*, 24 Wis. 326. (4) Even if the sheriff's deeds were defective, they were competent to show color of title. *Mansfield v. Pollock*, 74 Mo. 185. (5) The court erred in declaring that Bush was a *bona fide* purchaser and could not be bound by any estoppel existing against his grantor. Actual payment is necessary to a purchaser for a valuable consideration. *Paul v. Fulton*, 25 Mo. 156; *Bishop v. Scudder*, 46 Mo. 472; *Foster v. Holbert*, 55 Mo. 22. (6) The plea of the statute of limitations was a good defence. After the lapse of ten years a mortgagee can neither in equity nor at law enforce his demand against the realty covered by his mortgage. *Adair v. Adair*, 78 Mo. 630; *Rogers v. Brown*, 61 Mo. 187; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Hunter v. Hunter*, 50 Mo. 445.

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Yerby & Vance also for appellants.

(1) The court erred in excluding Sheriff Hawpe's deed to Trigg as evidence of title, because in the recitals "door" was left out after the word court house in describing place of sale, although appellant proved *aliunde* that said sale did take place at the court house door. *Buchanan v. Tracy*, 45 Mo. 437; *Wilkerson v. Allen*, 67 Mo. 502; *Durette v. Briggs*, 47 Mo. 356. (2) The court erred in not declaring the respondent barred under the statute of limitations, as the appellant held under Wm. H. Trigg, and Trigg under sheriff's sale made in 1865, under execution on judgment rendered in 1860, prior to Bryant's deed of trust, and if sheriff's deed was void, it was color of title and Trigg and his grantors, having taken possession under sheriff's deed, held adversely to Bryant, and having held openly, notoriously, uninterruptedly, and peaceably, claiming title for more than ten years, gave appellant title and the court should have so declared. Session Acts, 1863, page twenty-four, extending lien of judgment, authority of legislature to pass said act. *Ellis v. Jones*. 51 Mo. 181. Act retrospective and cuts out subsequent adverse interests. *Riggs v. Goodrich*, 74 Mo. 108, and authorities therein cited; *Warner v. Veitch*, 2 Mo. App. 459. That Wade's possession was an adverse one, see Hermann on Executions (1 Ed.) 511; Tucker's Commentaries (3 Ed.) top page 171, side page 176; same, top page 403, side page 413 and 414; *Rogers v. Brown*, 61 Mo. 195; *Bobb v. Woodward*, 50 Mo. 95; *Ridgeway v. Holliday*, 59 Mo. 444; *Brady v. West*, 60 Mo. 33; *Key v. Jennings*, 66 Mo. 367; *The Lessee of Ewing v. Burnette*, 11 Peters 52; *The Lessee of Mercer et ux. v. Selden*, 1 Howard 51, showing acts which establish adverse possession similar to this case. *Hunter et al. v. Hunter et al.*, 50 Mo. 451, in which the court says, ten years' bar applies to all actions for the recovery of land or for the enforcement of trusts growing out of lands. (3) The

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court erred in not declaring Bryant's deed of trust from Reeves, dated in 1861, barred by the statute of limitations of ten years, there having been no credits and no recognition of said trust and no interest paid, and no possession of said premises by the trustee or *cestui que trust* within ten years, and that a sale under it was void, and that Bush, the respondent, acquired nothing by his purchase. 4 Kent's Com. (6 Ed.) 189; 2 Story's Eq. Jur. (9 Ed.) pp. 215-216, secs. 1028 *a* and 1028 *b*; also, same vol. p. 733, sec. 1520; 2 Perry on Trusts (2 Ed.) p. 488, sec. 858; *Hughes v. Edwards*, 9 Wheaton (U. S.) 497-498; *Elmendorf v. Taylor*, 10 Wheaton (U. S.) 168; *Moreau v. Detchemendy*, 18 Mo. 529; *McNair v. Lott*, 25 Mo. 190; *McNair v. Lott*, 34 Mo. 285; *Hunter v. Hunter*, 50 Mo. 451. The court will observe that though twenty years is in all these cases spoken of as fixing the bar, yet it is expressly said that the period which fixes the bar is that period which the statute fixes to bar an ejectment, which our statute fixes at ten years. (4) The court erred in deducting the time of the absence from the state of Reeves, the grantor in the deed of trust to Bryant, thereby making the time less than ten years, and preventing the bar of the statute, notwithstanding the deed of trust had run for upwards of eighteen years before the sale without recognition, and the appellant had been in peaceable possession for upwards of sixteen years, the exception in statute applying only to personal actions. Revised Statutes, sec. 3236; 5 Cent. Law Jour. 253; 2 Hilliard on Mort. (3 Ed.) p. 30, sec. 30.

L. W. Scott also for appellants.

(1) The court erred in permitting plaintiff to introduce evidence to show the absence of the mortgageor from the state, for the purpose of bringing the mortgagee's debt within the statute of limitations, since the debt was due before he left the state, and the land might have

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been resorted to afterwards. 2 Hilliard on Mortgages (3 Ed.) sec. 30; *Eubanks v. Leveridge*, 5 Cent. L. J. 253; *Dunn v. Buckley*, 56 Wis. 190; *Teal v. Walker*, 12 Cent. L. J. 439. (2) The court erred in admitting in evidence the deed from Bryant, mortgagee, to Bush, the plaintiff, for the reason that the mortgage upon which it was founded was, at the time of the pretended sale, a stale demand and one which a court of equity would not have sustained and enforced in a foreclosure suit. *Smith v. Clay*, 3 Brown's Ch. R. 639; *Castner v. Walrod*, 83 Ill. 171. (3) The court erred in holding that the omission in sheriff's deed, to Trigg, of the word "door" invalidated the deed and that it could not be supplied by parol evidence. Abbott's Trial Evid. 702; *Wood v. Moorehouse*, 45 N. Y. 368; *Jackson v. Schaffer*, 11 Johns. 513; *McGoon v. Scales*, 9 Wall. 23; *Strain v. Murphy*, 49 Mo. 337; *Wilkerson v. Allen*, 76 Mo. 592. (4) The court committed error in holding the act of March 23, 1863, unconstitutional and void as to Bryant's mortgage. *Wood v. Messerby*, 46 Mo. 255; *Stewart v. Severance*, 43 Mo. 322; *Porter v. Mariner*, 50 Mo. 364. The legislature had the power to enact the law extending the lien from three to five years. *Ellis v. Jones*, 51 Mo. 180. (5) The court erred in its declarations of law and its finding to the effect that it was necessary for the defendant, Wade, to show in evidence, not only that he "held and claimed to hold the land adversely to the mortgage title at least ten years before the institution of this suit, but that he must also show that notice of this adverse holding and claim was brought home to the mortgagee, Bryant, for that length of time before the suit." 2 Hilliard on Mortgages, sec. 4; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Anderson v. Baxter*, 4 Or. 107; *Christopher v. Sparks*, 2 Jac. & W. 233.

Wallace & Chiles for respondent.

(1) There was no error in the court below in admitting in evidence the deeds made by Bryant, mortgagee,

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to plaintiff. Acts 1881, 171. (2) The sheriff's deed offered in evidence by plaintiff was rightly admitted. It was offered to show the title and *only title* of Trigg and Stephens in the land at the time they made their deed of June 6, 1866, being the equity of redemption of Reeves, and this is the claim of title and *only claim of title* under which defendant, Wade, entered into and possessed said land. Even if Trigg acquired any other title or interest by a subsequent sheriff's deed, which is denied, still it would not pass to Wade by such former deed of date June 6, 1866, which is but a *quit-claim deed* and does not pass an after acquired title. *Bogy v. Shoab*, 13 Mo. 365; *Valle v. Clemens*, 18 Mo. 486. *Gibson v. Chouteau*, 39 Mo. 536; *Butcher v. Rogers*, 60 Mo. 138; *Herman on Estoppel*, 306; *Tyler on Ejectment*, 530-540; *Mayor v. Buckley*, 51 Mo. 227. A title to land purchased at a sheriff's sale can only pass by the purchaser's obtaining a deed. *Leach v. Konig*, 55 Mo. 451; *White v. Davis*, 50 Mo. 33. (3) There was no error committed by the court below in excluding the alleged sheriff's deed made by B. H. Hawpe to Trigg, of date May 12, 1865, offered by defendant to show color of title. The deed failed to recite the date or amount of the payment and was void as a sheriff's deed, and as Trigg had never been in possession, it could show no color of title in Wade. *Frigate v. Pierce*, 49 Mo. 441; *Williams v. McLanahan*, 67 Mo. 499; *Tanner v. Stine*, 18 Mo. 580; *Pillow v. Roberts*, 13 How. (U. S.) 472; 1 R. S., 1855, p. 748, sec. 56; *Tyler on Ejectment* (Ed. 1870) 870. (4) The amended sheriff's deed offered by defendant, was properly excluded. It was fatally defective in not reciting that the sale was not made at the court house door. 1 W. S., p. 609, sec. 42 and p. 612, sec. 55; *Ruby v. Huntsman*, 32 Mo. 501; *Reid v. Martin*, 9 Mo. 878; *Kane v. McCown*, 55 Mo. 181; *Strain v. Murphy*, 49 Mo. 337; *Allen v. Moss*, 27 Mo. 354. The only remedy Trigg had, if any, was to procure a new sheriff's deed under the supervision of the court issuing the execution. *Ware*

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v. Johnson, 55 Mo. 500; G. S., ch. 160, sec. 1. Such deed could be good only against parties and privies, and purchasers with notice. *Ware v. Johnson*, 66 Mo. 662. The amended sheriff's deed was also defective, because the sheriff re-levied the renewed execution on the same property levied on by virtue of the returned execution, and purports to sell by virtue of *all the levies and executions*, and, hence, sells property embraced in the subsequent at the same time with that included in the original levy in violation of the statute (Acts 1863, p. —), under which the renewed execution was issued. It was beyond the power of the legislature to revive the lien of either a judgment or execution which has already expired. *Turner v. Keller*, 38 Mo. 332; *Riggs v. Goodrich*, 74 Mo. 108; *Wood v. Augusten*, 61 Mo. 46; *Maupin v. Emmons*, 47 Mo. 304; *Ex parte Bethurum*, 66 Mo. 545; *Neilson v. Chariton Co.*, 60 Mo. 386; *Abernathy v. Dennis*, 49 Mo. 468; *McCartney v. Alderson*, 54 Mo. 320. (5) Limitation does not run where the maker of a note departs from and resides out of this state after the cause of action accrues. G. S., ch. 191, sec. 16; W. S., p. 919, sec. 16; *Whittlesey v. Roberts*, 51 Mo. 120; *Cook v. Holmes*, 29 Mo. 61; *Miller v. Tyler*, 61 Mo. 40; *Johns v. Smith*, 43 Mo. 499. (6) There was no estoppel against plaintiff; Bryant's mortgage was on record when Wade purchased. *Bales v. Perry*, 51 Mo. 449; *Block v. Dorman*, 27 Mo. 31; *Appleton v. Kennon*, 19 Mo. 637; *Valle v. Amer., etc.*, 27 Mo. 455; *Allen v. Ransin*, 44 Mo. 263; *Riddick v. Grupman*, 49 Mo. 389. Statements and declarations of Bryant, if any, prior to the sale to plaintiff, are inadmissible in evidence to impair plaintiff's title. *Kean v. Newell*, 2 Mo. 9; *Beaujour v. Tutt*, 32 Mo. 576; *Howell v. Howell*, 37 Mo. 124. (7) In law both the mortgageor and those claiming under him when in possession of the land mortgaged, are in privity with and subservient to the mortgage and mortgagee; "and nothing short of an *open*, explicit disavowal and disclaimer of holding under that title, and

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assertion of title in himself brought home to the owner will satisfy the law," so as to make an adverse holding or possession. *Budd v. Collins*, 69 Mo. 129, 137, and 139 to 141, and cases cited; *Quinn v. Quinn*, 27 Wis. 170; *Goodwin v. Goodwin*, 69 Mo. 617; *Butler v. Lawson*, 72 Mo. 227; *Fulkerson v. Brownlee*, 69 Mo. 371; *McDowell v. Schneider*, 27 Mo. 412; *Carter v. Feland*, 17 Mo. 383; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; Tyler on Eject. (Ed. 1870) 876, 878; *Ibid*, 530-546-7, 918, 919, and 920; *McCandless v. Moore*, 50 Mo. 511; *Cook v. Travis*, 20 N. Y. 400. To be adverse, possession must be hostile in its inception. Tyler on Eject. (1870) 874, 876, and 877. The evidence in this case does not bring Wade's possession within the requirements of law to constitute an adverse possession against Bryant's mortgage.

MARTIN, C.—On the fourteenth day of May, 1881, the plaintiff sued the defendant, James White, in ejectment to recover one hundred and sixty acres of land occupied by him, and situated about ten miles from the city of Marshall, in Saline county. The defendant, William H. Wade, appeared, and on his own motion was made co-defendant with White, on account of holding to him the relation of landlord. In his separate amended answer, the defendant, Wade, denies the title of plaintiff, and pleads the statute of limitations. He also pleads facts tending to establish an estoppel against the claim of plaintiff, to the general effect that he had purchased the land and greatly improved it, relying upon the acts and assurances of the party under whom plaintiff derives title, that he possessed no such claim against the land as the plaintiff pretends to have acquired from him. The matters of the answer are formally denied in the replication. It appears from the evidence that the land in controversy was entered by one John D. Reeves, who received a patent therefor bearing date July 25, 1860.

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He is accepted by both sides as the common source of title.

The plaintiff claims through a mortgage deed made by said Reeves to one John W. Bryant, dated March 27, 1861, acknowledged and recorded May 4, 1861, which includes the premises in dispute, along with another tract contiguous thereto, as well as certain personal property, and which was given to secure a promissory note of said Reeves to Bryant in the sum of \$1,304.35, dated March 27, 1860, and payable one day after date. This mortgage deed vested in said Bryant the power of sale upon default of payment of the note. By a sale conducted by said Bryant in pursuance of the terms of the power, the plaintiff on the twenty-third of April, 1880, became purchaser of the premises he sues for, as well as certain other real estate contained in the mortgage. In consideration for this other real estate which was known as the Gorman tract, the plaintiff informs us that he gave to Bryant his promissory note in the sum of \$2,500, which, however, is not to be paid unless he succeeds in maintaining the title acquired by him. In consideration for the premises in controversy he gave his promissory note in the sum of nine hundred and eighty dollars, which, according to the testimony of both Bryant and himself, was taken and is to be treated as absolute payment for the land. This note is still in the hands of Bryant. Messrs. Bryant and Bush are both attorneys at law doing business in the same office in the city of Marshall, Saline county. The deed of mortgage and the mortgagee's amended deed to plaintiff, of May 10, 1881, were admitted in evidence, and being regular upon their face, they would seem to furnish him with a *prima facie* title to the land, notwithstanding the lapse of about nineteen years between the execution of the mortgage and the sale to plaintiff under it.

For the purpose of anticipating the defendants' evidence on the statute of limitations, the plaintiff introduced a sheriff's deed of the interest of said Reeves in

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the land to one Wm. H. Trigg, through whom defendants in their answer claim to have derived title. This deed is dated May 12, 1864, and purports to have been made in compliance with an execution sale under a judgment rendered against said Reeves on the eleventh day of November, 1863, in favor of the Farmers' Bank of Missouri. The judgment was subsequent to the mortgage, and Trigg paid at the sale \$2,100 for his purchase. The object of this evidence was to prove that Trigg, from whom defendants derive title, acquired only the equity of redemption, thus taking the place of Reeves, the mortgageor; and that neither Trigg nor defendants claiming under him could maintain that their possession of the premises was adverse to the rights of the mortgagee, subject to which they should be regarded as purchasing the land and making entry thereon. The plaintiff, also, introduced evidence tending to prove that Reeves, the debtor, was absent from the state a sufficient length of time to leave the defendants without the full bar of ten years' limitation against the plaintiff's claim.

In support of his title, the defendant, Wade, offered in evidence an amended sheriff's deed to said William H. Trigg, dated May 3, 1867, purporting to have been made in compliance with an execution sale of the premises made on the twelfth day of May, 1865, under a judgment in the circuit court of Saline county, in favor of said Trigg and against said Reeves and others, rendered November 8, 1860, thus antedating the mortgage deed under which plaintiff derives title. The deed recites a consideration of \$505 in cash paid by said Trigg, the purchaser. Defendants next offered in evidence a deed from said William H. Trigg and Joseph L. Stephens (who is alleged to have acquired an interest with said Trigg at the said execution sale), to defendant, Wade, dated June 6, 1866, and recorded May 18, 1867. This deed purports to convey all the interest, right and title of said Trigg and Stephens to the grantee. Defendant,

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Wade, as grantee therein, paid down seven hundred dollars in cash, and remained indebted for \$1,300 more, for payment of which the deed reserves a vendor's lien. These two deeds, if valid, would seem to defeat the plaintiff's case by vesting in the defendant a superior title. They were both excluded by the court for reasons which I will consider in passing upon the action of the court.

In support of his title by limitation, defendant, Wade, offered in evidence, a defective sheriff's deed to Trigg, dated May 12, 1865, and recorded January 25, 1866, purporting to be based upon a sheriff's sale made on the twelfth day of May, 1865, under an execution dated February 15, 1865, issued upon a judgment in favor of Wm. H. Trigg, and against John D. Reeves and others. The date and amount of the judgment do not appear in the blank spaces left for them. The defendants offered to prove that the only judgment in favor of Wm. H. Trigg against said Reeves was rendered November 8, 1860, and is the same one referred to in the amended sheriff's deed. This deed was excluded on objection of plaintiff. The object of defendants in offering it was to show that Wade, who took possession of the premises before the amended deed was executed, made his entry thereon under color of a superior title, and not in subordination to the equity of redemption previously acquired by Trigg, in May, 1864, as indicated by the sheriff's deed to him of that date. The offer of this deed was followed with evidence on the part of defendants tending to prove that immediately after his purchase from Trigg and Stephens, of June 6, 1866, defendant, Wade, entered upon the premises in controversy, which, at that time, consisted of unbroken prairie lands, enclosed the same, reduced them to cultivation, and erected thereon a house and barn, and that he has ever since been in possession thereof by himself or tenants, claiming to be the absolute owner thereof and holding the same adversely to Bryant and his assigns. The evidence shows that during all this time no payment was made

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upon the mortgage debt, and that no rents or profits were received to the use of the mortgagee.

It appears that Bryant, the mortgagee, made several efforts to collect his debt against Reeves and his wife by suit, but that he had never asserted it in any way as a claim or subsisting lien against the premises in controversy. Several witnesses, including the defendant, Wade, testify to conversations had with Bryant, in which he declared that he made no claim against the land in controversy by virtue of his mortgage. These conversations are denied by Bryant. He admits, however, in explanation of his failure to assert his mortgage, that as early as 1866, he examined the records bearing upon the title, and came to the conclusion that his mortgage right had been cut out by the sheriff's sale under the judgment of November 8, 1860; but that by a subsequent examination of all the authorities, English and American, he had satisfied himself that he was wrong in that conclusion.

The court gave seventeen instructions at the instance of plaintiff. They are too long and numerous to be included in any statement. About half of them relate to deeds, which the court excluded, and for that reason their pertinency is not apparent. The rulings contained in them are all involved in the action of the court excluding the deeds, and need not be considered in connection with anything else. In respect to the defence of the statute of limitations, the court in substance ruled that, if Wade, by virtue of the deeds admitted in evidence, acquired only the equity of redemption, then his possession, although continued for ten years, was not adverse to Bryant, the mortgagee, unless actual notice of an adverse holding was brought to the knowledge of Bryant ten years before the commencement of this suit. As owner of the equity of redemption, the court declared that Wade could not dispute the mortgage, nor set up an outstanding title. It declared as a matter of law, that the note described in the mortgage was not

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barred by the statute of limitations and that the absence of Reeves from the state could not be included in the limitation of time within which the mortgage debt had to be asserted. These annunciations of law are repeated in different forms which need not be rehearsed here. It is unnecessary to review the instructions which the court refused to give at the instance of defendants. They relate to a title and to a possession which the court would not permit to be proved. The errors of which the defendants complain, if any, were suffered before the time for giving instructions had arrived. The issues were found in favor of plaintiff, and judgment rendered accordingly, from which action of the court the defendants appeal.

I. The most important question presented in the record for our determination relates to the amended sheriff's deed of May 3, 1867, which was excluded by the court. An admission of it would have ended the plaintiff's case, for the reason that it proves an outstanding title superior to the one he sues upon. In this deed the judgment of November 8, 1860, against Reeves and others, and in favor of William H. Trigg, is recited as the foundation of the sale. The deed, also, recites in detail that an execution was issued on said judgment February 22, 1865; that it was levied upon the real estate in controversy, and that after notice posted according to law, all the interest, title and estate of said Reeves was, on the twelfth day of May, 1865, sold by the sheriff to said Trigg, as the highest and best bidder. This levy and sale was conducted by sheriff Hawpe, but the amended deed was made by him after the expiration of his term of office. The first deed made by him being defective, in failing to state the date and amount of the judgment, he had the right to make an amended deed. R. S., 750; G. S., p. 647, sec. 60; *Porter v. Mariner*, 50 Mo. 364.

The lien of this judgment would have expired, according to law, November 8, 1863; but before its expira-

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tion the legislature, by act of March 17, 1863, extended the term of existing judgment liens to five years. Sess. Acts 1863, p. 24. The constitutionality of this act has been settled by this court. *Ellis v. Jones*, 51 Mo. 180. Thus it appears that the lien of the judgment of November 8, 1860, was in full force when the execution of February 22, 1865, was issued, as well as when the sale under it was effected, May 12, 1865. Such a sale would operate to transfer the title of Reeves as of the beginning of the judgment lien, and would vest the purchaser with a title superior to the one derived from the subsequent mortgage lien. The court, however, ruled that the sheriff's sale and deed did not operate as an enforcement of the judgment lien at all. This ruling is predicated upon certain recitals appearing in the amended deed and upon the act of March 23, 1863 (Acts 1863, p. 19), relating to the extension and revival of execution liens. In his deed, the sheriff recites two previous executions under the same judgment, one levied on the eighth of April, 1861, the other on the tenth of March, 1864, upon the land in controversy; the first returned unsatisfied on account of the sheriff's resignation of his office before return day, the second returned in like manner by order of plaintiff. After recital of these previous executions, the deed continues: "And by virtue of said levies and the statute in such case made and provided, I, as sheriff as aforesaid, did re-levy said last named execution (that of February 22, 1865), on the real estate hereinbefore named, and did seize upon all the right, title, interest, claim, estate, and property of the said John D. Reeves in and to the same," and "by virtue of all, each and all of said executions, levies, and the statute in such case made and provided * * * did expose to sale" the interest and estate of said Reeves.

It is argued by the learned counsel for plaintiff that this last execution of February 22, 1865, was a renewed execution under authority of the first section of the act

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of March 23, 1863, which provides for the revival, extension and enforcement of the liens of all executions then remaining unsatisfied; and that the office of the execution in question, as well as the purpose of those controlling it, was to enforce only the lien of the unsatisfied executions previously issued. It is argued that the execution was intended for this purpose alone, and that it could not be used to enforce the lien of an unsatisfied judgment. It is next argued, that while the sole office of the execution was to enforce the extended or revived liens of previous unsatisfied executions, the liens of the executions recited in the deed had expired, and that it was not within the power of the legislature to revive them; and that, consequently, nothing passed at the sheriff's sale of May 12, 1865. Without maintaining that the legislature could lawfully revive the lien of an expired execution, I fail to recognize any controlling weight in this argument. The execution under which the sheriff made sale could not be found, although there was evidence, outside of the deed, of its issue. The precise language of it is, therefore, wanting. I infer from the recitals that it was a third *fieri facias* in the usual form, properly enough referring to the two previous executions. As such, I think it was clearly within the purview of the statutes, which award to every judgment creditor an execution as a matter of course, for the purpose of enforcing his judgment. 1 R. S., 1855, pp. 735, 736, secs. 1 and 2. The lien of his judgment had, before its expiration, been extended by the act of March 17, 1863. I see nothing in the law, as it then stood, forbidding him to have an execution to enforce the lien of his judgment. Neither do I find anything in the act passed six days afterwards assuming to curtail or take from him this right. That act relates only to the extension and revival of the liens of unsatisfied executions, and provides for a method of enforcing them by a renewed execution without the necessity of a relevy upon the property originally covered by them. It

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makes no allusion to judgment liens, and does not assume to change the usual method of enforcing them by a *fiery facias*.

In this case there was a distinct levy of a third execution, an official act which was necessary to enforce the judgment lien, which remained unsatisfied after the issue and return of two unsatisfied executions. The sheriff, by reciting his new levy, must have considered himself as enforcing the judgment lien. He assumes to sell and convey to the purchaser all the rights, title and estate of the debtor which could be seized and sold by virtue of this levy. I do not think it reasonable that the meaning and effect of his act should be vitiated, because he indulged in some superfluous recitals about previous unsatisfied and expired executions; the levies of which it was probably beyond the power of the legislature to revive as against the rights of third persons. It may be remarked here that the act of March 23, 1863, contemplates the issue of only one renewed execution to carry out the levy of an execution then remaining unsatisfied. While the second execution recited in the deed might with some show of plausibility answer the description of such renewed execution, the third one under which the sale took place would not seem to fall within the purview of the act. Its connection with the previous levies would, therefore, be governed by the general law, which I am satisfied would give to it a force of its own, derived from the independent levy under it. I may add here that this deed could not be successfully impeached by proof that any of the prior executions on the judgment of November 8, 1860, had been levied on personal property, so long as it appears that the levies were fruitless, and the judgment remained unsatisfied. *Porter v. Mariner*, 50 Mo. 364.

II. Another objection to this amended deed is that it recites that the land was sold at the court house, while the statute requires that it should be exposed for sale at

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the court house door. 1 R. S., 1855, sec. 45, p. 746. The defective deed recites that it was sold at the court house door, and the defendants offered to prove that it was sold at that place. I have considered the arguments on this point, and I am satisfied that after fifteen years or more of possession under it by the purchaser or his assigns, the supposed defect is not material enough to defeat the deed. I think the sale should be sustained if the requisite act of the officer can be inferred from a reasonable construction of the language used by him. In reciting that he made the sale at the court house, he would, ordinarily, be understood as conveying the information that his sale there was conducted at the lawful and customary place for execution sales. I think the authorities strongly tend to support this construction of the recital. *German Bank v. Stumpf*, 73 Mo. 311; *Hornby v. Cramer*, 12 How. Pr. 490; *Mers v. Bell*, 45 Mo. 334; *Long v. Joplin M. & S. Co.*, 68 Mo. 422.

✓ III. It is further objected that, although the amended deed may be effective as a conveyance, the defendant, Wade, by reason of the supposed subservient relation he holds to the mortgage and the purchaser under it, is estopped from setting it up as an outstanding title. In respect to this objection, I may venture to remark that the exclusion of the deed from Trigg and Stephens to Wade relieved him from any supposed subordinate relation to the plaintiff, or those under whom he derives title, and left him as an adverse occupant, relying upon his actual possession for a title. Thus situated, there is no law forbidding him from setting up an outstanding title or buying it in for his own protection. But treating the last mentioned deed as in evidence, as the plaintiff contends it was, I am persuaded that it establishes no relation which would deprive the defendant of the benefit of his plea, as will appear upon further consideration of the point. It is true that the admission of the deed would furnish Wade with the only title which his grantor was allowed by the rulings of the court to

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possess, namely: The title acquired at an execution sale under a judgment subsequent to the mortgage. It is insisted that by virtue of this title, he took the place of Reeves, the mortgageor, and that as owner of what was anciently known as the equity of redemption, he is disabled from disputing the title of the mortgagee. This position must have been approved by the court under a misapprehension of the law at present prevailing on this subject. Under the ancient common law, the mortgagee was regarded as the legal owner of the estate, and as entitled to its possession. The mortgageor was possessed of only an equity of redemption. The possession of the mortgageor was treated as the possession in law of the mortgagee, to whom he held the relation of a quasi-tenant. By virtue of this relation alone he was disabled, like any other tenant, from setting up or acquiring any title hostile to the mortgagee. But in the courts of equity the rights and relations of the two parties gradually underwent a change. The mortgageor, and not the mortgagee, was regarded as seized of the legal estate. It passed by descent to his heirs and was transmissible by deed or devise. The mortgagee was denied any legal estate. It did not descend to his heirs nor was it subject to sale under execution. He was regarded only as the owner of a lien on the land of the mortgageor, and his remedy for its enforcement was by foreclosure and sale. In this transformation, the subservient relation of the mortgageor as tenant would seem to disappear; and with it would, necessarily, disappear the rule forbidding him to plead an outstanding title. No foundation for the estoppel exists unless there is an express or implied obligation to restore the possession at some time or in some event, to the person or his privies who invoke it. Tyler on Ejectment, 123; *Hill v. Hill*, 4 Barb. 419. No such obligation exists between the mortgageor and mortgagee of the present day, at least in this state. Especially is this true of a mortgage like the one asserted in this case, which gives to the mortgagee only a lien on

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the land, coupled with the naked power of enforcing it by a public sale. These changes, which originated in the courts of equity, have at last come to prevail in the courts of law. Chancellor Kent, in commenting on the changes effected in that court, remarks: "The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law." 4 Kent's Com. 158.

My conclusion is that no relation of subserviency on the part of defendant, Wade, to the mortgagee or to the plaintiff, was established by the deeds referred to, which would estop him from setting up the outstanding or after-acquired title excluded by the court. I would not be understood as holding that a mortgageor might not in his mortgage be subject to such covenants, express or implied, as could embarrass him in pleading an outstanding or after-acquired title. But the embarrassment, if any, would spring from the covenants, and not from any supposed relation of subserviency, and might occur to any vendor using the same covenants. 2 Jones on Mortgages (3 Ed.) sec. 1483. It is, perhaps, unnecessary to add that impediments of this character are not in the way of the defendant, Wade, to whom the plaintiff concedes the mortgageor's title by a deed without covenants, from the purchase thereof at execution sale. According to this conclusion, the court erred in excluding the sheriff's amended deed.

I think it, also, erred in ruling that the deed of Trigg and Stephens, to Wade, did not operate to convey the title acquired by Trigg, as evidenced by the amended sheriff's deed. It is true, the amended deed was made after execution of the Trigg and Stephens deed to Wade, but Trigg had acquired the title at the execution sale, before his conveyance, and the amended deed of the sheriff conveyed it as of the date of the sale. The sheriff could not convey it as of any other date. The

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deed is evidence that he had the title at the time of his deed to Wade. *Mariner v. Porter*, 50 Mo. 364; *In re Guenzler*, 70 Mo. 39.

IV. We now come to the defence of the statute of limitations. The court ruled that the statute did not commence to run against the mortgagee, until actual knowledge by him of an adverse holding on the part of the mortgageor or his assigns. This ruling was erroneous for the same reasons which invalidate the ruling in respect to the defence of an outstanding or an after acquired title. While the mortgageor was regarded as the tenant *sub modo* of the mortgagee, the rule which disabled him from availing himself of the statute of limitations, before some open act of hostility which severed the subservient relation, rested on a solid foundation. But when the courts come to deny the legal title or the right of possession to the mortgagee, there would seem to remain no material foundation for the rule. After recognizing in the mortgagee only a lien on the land, without any legal estate or right of possession, it was found that the statute which related only to the legal estates and demands, did not include the claim of a mortgagee. The courts, however, came to adopt in respect to his rights the limitation prescribed in actions of ejectment. But the rule, like most rules resting only on analogy, was never enforced with the precision and strictness prevailing in actions of ejectment. The courts were not able to escape entirely from the ancient idea of some sort of servieney attaching to the mortgageor's possession. Accordingly it will be found, as shown in the cases cited by the learned counsel of plaintiff, that the limitation of the statute by analogy has been denied in many decisions of this and other states, before some open act of the mortgageor, denying the existence or validity of the mortgage, has been brought home to the mortgagee. But these rulings are without support in the more recent decisions of this court, in which our statute of limitations is regarded as applying to liens and claims against real

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estate as well as to the legal title thereof. *Rogers v. Brown*, 61 Mo. 187; *Hunter v. Hunter*, 50 Mo. 445; *Adair v. Adair*, 78 Mo. 630; 2 Jones on Mortgages (2 Ed.) sec. 1210; *Johnson v. Johnson*, 81 Mo. 331.

Our statute begins to run against the lien of a mortgagee as soon as his right of action accrues thereon. The running of the statute is not arrested until the mortgageor has committed some act of hostility ignoring the supposed subserviency of his possession, and denying the existence or validity of the mortgage lien. By an express provision of our statute it is arrested as to the debt by part payment or an acknowledgment of it in writing. These acts are sufficient to keep the mortgage lien alive as incident to the debt, if they happen while the mortgageor owns the land. I will not pretend to say that a mortgageor may not by competent contract or writing made for that purpose, continue the mortgage lien as a claim against his land, after the mortgage debt is barred by the statute. But it is unnecessary here to pursue this inquiry, for the evidence in this record fails to disclose any such act of the mortgageor or those possessing his title. There was no part payment by defendants or those under whom they derive title of the mortgage debt, and likewise no acknowledgment of it in writing; much less any distinct recognition of the mortgage lien, which would operate as an extension of it irrespective of the debt it was given to secure. To prevent misunderstanding, I will add here, that when the mortgagee is in possession I do not doubt the doctrine of his relation as a trustee to the premises he holds to secure the mortgage debt. But, under the law of this state, which gives the possession and rents and profits to the mortgageor before foreclosure of the security, I fail to find any element of trust, which would arrest the running of the statute against the mortgage claim. The mortgagee has his remedies in equity to prevent a destruction of the mortgaged estate, which might depreciate his security. But all rights of this character fall

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short of converting the mortgageor into a tenant or technical trustee to his use.

It is urged that the absence of Reeves, the mortgageor, from the state should be deducted from the period of limitation claimed by defendants. When the mortgageor as debtor and owner of the land departs from the state, I recognize, without sanctioning, the cogency of the argument by which his absence is to be deducted from the period limited for enforcing the mortgage. This deduction has been approved under statutes similar to our own in respect to the exception of absence, and, without approving, I have no inclination here to controvert the conclusion. It will be seen that this exception has been recognized, notwithstanding the right left to the creditor to enforce his debt against the mortgaged premises by the extraordinary process of publication and by the process of a sale out of court under the power of sale contained in the mortgage. *Emory v. Keighan*, 94 Ill. 543; *Whalley v. Eldridge*, 24 Minn. 358. But if the mortgageor's absence happens after he has parted with his estate or been divested of it, the reason for deducting his absence, so far as any proceeding against the land is concerned, is wanting. He has ceased to be a necessary party to such proceeding, as it rests in the ordinary process of suits. His assignee as owner of the land is answerable to the ordinary process of law for the purpose of enforcing the mortgage, and the debtor is not a necessary party. This view has been approved in the recent case of *Zoll v. Carnahan*, 83 Mo. 35. As the absence of the debtor, Reeves, necessary to deprive the defendants of the full benefit of the statute, happened after he had been sold out, the running of the statute cannot be regarded as interrupted. In accordance with these views, the instruction that the defendants were entitled to a judgment on their defence of the statute of limitations ought to have been given. If the deeds offered by defendants to sustain their title had been

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admitted they would have been entitled to a judgment on that issue.

Proceeding to render a judgment in the case to which the defendant was entitled under the evidence and pleadings, it is ordered that the judgment of the circuit court be reversed, and judgment be entered in favor of defendants. All concur, except Henry, C. J., absent.

MELCHER V. THE EXCHANGE BANK OF JEFFERSON CITY,
et al., Appellants.

1. **Injunction.** Injunction will lie to restrain the collection of notes included in a settlement of accounts previously had between the parties.
2. ———. The injunction in this case held improperly granted by the trial court because the evidence did not show that the notes were included in the settlement as claimed by plaintiff.
3. **Attorney, Authority of.** An attorney having in charge certain notes for collection and settlement cannot, without his client's consent, include in the settlement other notes not in his hands.

Appeal from Cole Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

Smith & Krauthoff and *A. M. Hough* for appellants.

(1) Injunction is not a proper remedy in this case. It is a well settled rule that an injunction will not be granted where there is a full and adequate remedy at law. High on Injunction, section 30. The plaintiff had his remedy at law. *Milliken v. Shapleigh*, 36 Mo. 596; *Wilson v. Smith*, 3 How. 763; Wells on Re-

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plevin, sec. 59; *Groff v. Shannon*, 7 Ia. 508; *Murray v. Burling*, 10 Johns. 172; *Bissel v. Drake*, 19 Johns. 66; *Wilkins v. Hogue*, 2 Jones' Eq. 479; *Bigelow v. Andress*, 31 Ill. 322; *Waterman v. Johnson*, 49 Mo. 410. (2) But if injunction was the proper remedy, the right of the case on the evidence is with the defendants. The receipt shows that only the notes in the hands of Ewing & Hough were covered by the settlement. *Grumley v. Webb*, 44 Mo. 444; *Maddux v. Bevan*, 39 Md. 485. (3) Even if the settlement of Ewing & Hough was broad enough to cover other notes than those in their hands, they had no authority to include them or bind Aultman to deliver them. The power to compromise is not possessed by an attorney, unless expressly conferred by the client. *Davidson v. Rozier*, 23 Mo. 387; *Walden v. Bolton*, 55 Mo. 405; *Spears v. Ledergerber*, 56 Mo. 465; Weeks on Attorneys, 397, and notes.

G. T. White and *Edwards & Davison* for respondent.

(1) Injunction is a proper remedy. High on Injunction, section 12; *Dunneroder v. Thias*, 51 Mo. 100; *Turner v. Stewart*, 78 Mo. 480. (2) It was not necessary that there should have been any charge of insolvency or proof of the same. R. S., 1879, sec. 2722; *Turner v. Stewart*, 78 Mo. 480. But even if this was necessary, it stands admitted in the record that C. Russell & Company were bankrupts, and that Aultman was their assignee, that these notes were executed to him as such assignee, and that he was a citizen of the state of Ohio. The Exchange Bank was only a nominal party. (3) The attempt to construe the receipt given by Melcher's attorney, executed after the contract was made, into a contract of compromise cannot be sustained. (4) The statement that Edwards was fully advised as to what notes and accounts were being settled is unfounded in

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fact. The evidence of Edwards shows that no account was taken of the amount being settled, but the attorneys were settling the indebtedness between Melcher and Aultman, and this is not denied by Hough or any one else. (5) Aultman had full knowledge of the fact that his attorney had compromised with Melcher and he received the amount paid them in the compromise, and whether he had previously authorized them to compromise and settle with Melcher is immaterial. *Simple v. Atkinson*, 64 Mo. 504; *Grumley v. Webb*, 48 Mo. 584.

DEARMOND, C.—This is a proceeding by injunction to restrain defendants from collecting certain promissory notes signed by plaintiff as surety or guarantor, and to compel defendant, Aultman, to assign and deliver such notes to him and the other defendant to pay over to him the amount collected by it on a specified note. Melcher lived in Cole county, Missouri, Aultman in Ohio. The firm of C. Russell & Company had been adjudged bankrupts in a federal court in Ohio and Aultman appointed their assignee. Melcher had sold machinery for Russell & Company, and later made sales for their assignee under a contract, for the performance of which he gave bond. By this contract Melcher was required to guarantee in writing the payment of all notes taken by him for machinery sold for the assignee. This he did. But he fell behind in his accounts with Aultman and became insolvent. In course of time Aultman sent to Ewing & Hough, attorneys at Jefferson City, for collection an account against him for about six hundred dollars, and five promissory notes signed by him as guarantor, aggregating in amount about five hundred dollars. Not being able to obtain payment from the makers of these notes the attorneys turned to the guarantor and applied to him for payment of the notes as well as the account. The notes were shown to him and "figured up" and their amount ascertained in his

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presence. Negotiations for compromise and settlement began between J. R. Edwards, of Edwards & Davison, attorneys representing Melcher, and A. M. Hough, of Ewing & Hough, representing Aultman. They ended in a settlement, the terms and scope of which are in dispute in this action.

Edwards paid Hough four hundred and fifty dollars, and this receipt was passed: "Received of J. R. Edwards the sum of four hundred and fifty dollars, in full of all claims in our hands for collection against Nick. Melcher in favor of C. Aultman, assignee of Russell & Company, bankrupts, *the same being an entire and full settlement* between the said Aultman, assignee as aforesaid, for all notes, machinery and repairs of whatever kind and description, and all notes and claims of which Melcher is security or guarantor. All notes to be assigned to him for his own benefit.

"EWING & HOUGH,

"For C. AULTMAN, Assignee."

Respecting this receipt Mr. Edwards in his testimony says this: "When I handed Hough the receipt to sign he made some objection to it, and asked me to put it in these words: 'In our hands.' I said to him, 'Well, Hough, I don't know whether it makes any difference, as we are settling the whole matter between Melcher and Aultman, and if you prefer it I will add those words;' he said, 'I understand we are settling all Melcher's indebtedness to Aultman, but I don't want that fellow to come back on me if there should be other notes out; I don't know of any, and my understanding is that these are all the notes against Melcher.' With this understanding and at the request of Mr. Hough I made the addition of the words in the receipt."

The six hundred dollar account was receipted and the five notes, after being assigned "without recourse" by Aultman to Melcher, were handed by Hough to Edwards in an envelope. By the settlement Melcher acquired the property in five machines and a lot of repairs,

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theretofore belonging to Aultman, assignee, valued at two hundred and fifty dollars. Some of the notes turned over were signed in German and Edwards did not notice what or how many notes were in the envelope. He swears positively that the settlement was of all Melcher's indebtedness to Aultman, and that all the notes signed by Melcher as surety or guarantor were to be by Aultman assigned to Melcher, for Melcher's own use and benefit. Neither Edwards nor Hough knew how many notes Melcher had so assigned. Neither knew that there were any such notes except the five put into Ewing & Hough's hands for collection. Hough told Edwards the five notes amounted to about five hundred dollars. No mention was made by Melcher or Edwards of any notes other than those five, and what Hough said on this point is shown in the evidence of Mr. Edwards above transcribed. Hough thought they were settling all the notes, as will further appear. Some time after this settlement, Melcher called at Edwards & Davison's office to get a note on one Phillip Koeppel. It was not in the envelope where the five notes, before in the hands of Ewing & Hough, were found. Upon inquiry it was learned that this Koeppel note which was for about one hundred and seventy dollars, was with another note for about one hundred and seventy-five dollars, and still another for seventy-five dollars, in the Exchange Bank for collection. These three notes were payable to Aultman, assignee, and signed by Melcher as guarantor, and had been placed in the bank by Aultman. Thereupon, Edwards, as attorney for Melcher, called upon Hough and told him what he had just learned, and asked Hough his recollection of their settlement. Hough expressed surprise at the turn of affairs, and as indicative of his understanding wrote Aultman the following letter, which Edwards, to whom he showed it, agreed was according to his understanding, too :

"*C Aultman, Canton, Ohio.*

"DEAR SIR: Yours of the 28th ult. received.

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Our understanding was that we were settling Melcher's account with you as assignee. Nothing had been said about any other notes than those we held for collection in your letters to us or ours to you, and we were under the impression that the notes we held for collection and the account was the *whole of his indebtedness*. Melcher mentioned no other notes to us. While our receipts covered only the notes held by us and the account, *we supposed that settled the whole of Melcher's indebtedness to you*. Mr. Edwards to-day served a notice on us that he would on the fourteenth of March, 1881, present a petition to our circuit judge to restrain the collection of the notes held by the Exchange Bank and to compel a delivery and endorsement of them to Melcher.

"Very Truly,

"EWING & HOUGH."

Meanwhile the bank collected the Koeppel note of one hundred and seventy dollars, and Melcher sued out a temporary injunction to restrain the collection of the other notes and the payment to Aultman of the one hundred and seventy dollars already collected, and to compel Aultman to assign and deliver to him, Melcher, all the notes signed by him as guarantor or surety as aforesaid, and to compel the bank to pay him the one hundred and seventy dollars. Aultman never gave his attorneys any authority to include in the compromise any notes except the five in their hands for collection. He understood the settlement to cover no notes except those five; Melcher understood it to cover all the notes he had signed in manner as before stated. There is nothing in the record to show whether or not Aultman has still other notes signed by Melcher as guarantor or surety. Among the letters that passed between Aultman and his attorneys are these:

"CITY OF JEFFERSON, Mo., Jan. 21, 1881.

"C. Aultman, Assignee, Canton, Ohio.

"DEAR SIR: We have just this day succeeded in

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getting a statement and proposition of Nicholas Melcher in regard to the indebtedness due you as assignee. He says he has three old machines, one here, one at Mt. Pleasant, Miller county, and one at Osage City, this county, and about twenty-five dollars' worth of repairs. He rates the machines at seventy-five dollars each. He says he will give you four hundred dollars cash for a settlement in full, and you deliver the notes we have to him, and he keep the property he has on hand. That is probably as much as you can ever get out of him. We consider a judgment against him worthless. If you are not willing to accept his figures, send us yours. We will pursue whatever course you may desire.

“Very Truly,

“EWING & HOUGH.”

“CANTON, OHIO, January 25, 1881.

“*Ewing & Hough, Jefferson City, Mo.*

“GENTLEMEN: Your favor of the twenty-first inst. concerning the N. Melcher claim is received, and in reply to the proposition he makes I have to say that if he will satisfy your charge in this matter so as to net us four hundred dollars in cash, I will accept the amount in settlement in full of his account, and the notes in your possession on which he is endorser or guarantor, and which are said to be worthless or uncollectable.

“Yours Truly,

“C. AULTMAN, Assignee.”

All the negotiations were between Edwards and Hough, representing their respective clients. The principal issue raised by the pleadings and evidence is whether the settlement embraced all notes to Aultman, signed by Melcher as guarantor or surety, or only the five notes which Ewing and Hough had for collection. Upon the hearing the court found that all notes as aforesaid, were covered by the settlement and made perpetual the injunction restraining the collection by defendant of the said notes and requiring that Aultman should as-

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sign to Melcher all such notes, and that the said bank should pay to him the one hundred and seventy dollars collected from Koepfel. The defendants appealed.

I. It is argued that plaintiff had an ample remedy in a suit in attachment or replevin. Without discussing at length the law of injunctions, as laid down in our statute, I may adopt the views expressed in the case of *Turner v. Stewart*, 78 Mo. 480, as applicable to, and decisive of this question. Under our broad statute (section 2722, R. S.) the court of equity did not err in entertaining jurisdiction. It was not bound to force the plaintiff into the actions suggested, wherein bonds would have to be given to secure the possession of the things sought, and where the remedy would probably have been inadequate. Nor should the court lightly deny jurisdiction when to do so may be to drive one of our own citizens from the home forum to contend for his rights before a foreign tribunal.

II. It is evident to my mind from all that appears in the record, that Melcher never told either his own attorney or Aultman's attorney what notes or how many notes he had signed as surety or guarantor. It is equally clear that Melcher was told just what notes Ewing & Hough had for collection. His attorney knew about how much those notes amounted to. His attorney, too, meant to settle the whole matter between Melcher and Aultman, and according to his understanding did settle it all. Hough, as attorney for Aultman, understood they were settling the whole matter. This understanding was based upon the assumption that there were no other notes to be settled. That is evident from the receipt, the amendment made to the receipt, and the remarks of Hough at the time the receipt was given, as detailed by Mr. Edwards. Hough understood that everything was settled, for nothing had been said about anything else between Melcher and Aultman. But Hough realized that there might be other notes out and as he was pro-

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ceeding upon the theory that there were none he would make the receipt its own interpreter by limiting the notes settled to the ones "in our hands." Why? Mr. Edwards tells us: "*He said, 'I understand we are settling all Melcher's indebtedness to Aultman, but I don't want that fellow to come back on me if there should be other notes out; I don't know of any and my understanding is that those are all the notes against Melcher.'*"

Now, as we have already seen, Hough did not know that any other notes were out. He had never heard of any other notes. He had talked with Melcher, and Melcher had not intimated that there were any others. He believed that the five notes he had shown to Melcher were all the notes on which Melcher was liable to Aultman. Melcher might easily have suggested that there were other notes, and that they, too, must be included in the settlement. Again, how could Hough be guarding against "that fellow" coming back on him if he was bargaining away to Melcher the notes out, "if there should be other notes out," as well as the five notes in his hands? What meaning can Hough's remarks and his receipt, as he insisted on having it, convey if not this: That he understood that they were settling all the notes because he knew of no others and believed there were no others; but that if there were others in fact he would escape a possible difficulty with his client by so wording his receipt that it could not be made to appear by the receipt that the notes of which he knew nothing were embraced in the settlement? He said in effect: "Our settlement covers all the notes I know of and I all think that exist, but if there should be other notes out such other notes are not affected by this settlement." That Aultman did not authorize his attorneys to include the notes in dispute in the settlement, and did not understand that they were included, is too clear to justify comment upon that part of the evidence. Melcher and his attorney understood the settlement to embrace every-

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thing between the parties. The understanding arose from Melcher's neglect to inform his attorney that the five notes in Ewing & Hough's hands were not all the notes to be settled. It is not necessary to consider whether this evident misunderstanding could be made the basis of an action against the party who should refuse to do his part toward putting each into his former position, but I do not find in it all the necessary facts upon which the injunction can rest. Edwards and Hough made the settlement and in the light of all the facts their settlement did not, I think, entitle Melcher to any but the five notes which were duly assigned to him.

III. Since Ewing & Hough had no authority to include any but the five notes in the settlement, and since Aultman never recognized the settlement as covering any other notes, I would hold, even if Hough had settled the other notes, that such settlement would not be binding upon Aultman. The attorney cannot thus bind his client without his authority, and especially as to something outside of the business entrusted by client to attorney. *Spears v. Ledergerber*, 56 Mo. 465. I think the court erred and its judgment should, therefore, be reversed and the cause remanded with directions to dissolve the injunction. Martin, C., concurs; Ewing, C., not sitting, having been of counsel below; Henry, C. J., absent.

CORBY *et al.*, Appellant, v. CORBY *et al.*

1. Will, Construction of; LIFE ESTATE. A devise and bequest by a testator to his wife of all his property of every kind, real, personal and mixed, immediately followed by a bequest to her of all his moneys, notes, bonds, bank stock, etc., to have and to hold during her natural

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life construed, when taken in connection with subsequent clauses of the will which clearly show that he had not intended to convey her an absolute estate in fee, to confer upon the widow only a life estate in the realty. The words "to have and to hold during her natural life" are limitations upon the estate in the realty devised as well as upon that in the moneys, notes, bonds, etc., bequeathed.

2. — : PRECATORY TRUST. A precatory trust is not to be inferred from expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such trust, and especially no such trust will be implied when it clearly appears from the will that the testator intended to give the devisee full discretion in the use of the property.
3. **Life Estate : TRUST.** A condition annexed to a devise and bequest of a life estate to a wife, that the testator leaves it to her discretion after providing for her own wants and comforts to give to such of his relations such aid or assistance as she may of her own will think proper and just, *held* not to constitute an expression of desire or confidence from which a trust may be implied, and that under this will the widow holds the life estate absolutely and not subject to any trust whatever.
4. **Will, Construction of : POWER OF DISPOSITION : RELIGIOUS USES.** Subsequent clauses of the will declared that the balance of the testator's property would be given to advance the cause of religion and promote the cause of charity in such manner as the wife might think would be most conducive to the carrying out of the testator's wishes, and empowered the widow to lease or sell property for the benefit of the estate. *Held*, that these provisions confer upon the widow no such powers of disposition as to enlarge her life estate to a fee or to constitute her a trustee for the heirs at law, the objects of the religious and charitable uses contemplated by these provisions being alleged to be illegal.
5. — : — : — : — : TRUSTEE. A will conferring upon the testator's widow a life estate in all his property, then declaring that the widow will give all the balance of the estate to religious and charitable uses, and finally empowering the widow to lease or sell parts of the real estate for the benefit of the estate, does not vest in the widow the fee in the property, of which, the religious and charitable purposes failing by reason of their illegality, the widow will be held a trustee for the use of the heirs at law.
6. **Trustee.** In order to constitute a party a trustee it is necessary to vest in that party an estate to be held in trust.
7. **Waste.** The petition in this case held to be insufficient to charge the tenant for life with waste.

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Appeal from Buchanan Circuit Court.—HON. JOS. P. GRUBB, Judge.

AFFIRMED.

Doniphan & Reed and *A. H. Vories* for appellants.

(1) Those portions of the will in question which seek to enjoin a trust upon Mrs. Corby, by which parts of the testator's estate were to be disposed of to advance the cause of religion and promote the cause of charity, in such a manner as to meet the views of the testator secretly communicated at some time by said testator to Mrs. Corby, were void, because such parts were not reduced to writing and duly attested by the subscribing witnesses, as required by the statutes of this state. R. S., sec. 3962; 1 Jarman on Wills (5 Ed.) 409, 410; *Schmucker's Estate v. Reel*, 61 Mo. 598; *Phelps v. Robbins*, 40 Conn. 251. (2) The disposition of the testator under the provision in question is a mystery. The supplementary testament rests in parol, but parol testimony of such disposition cannot be admitted to supplement the writing. 1 Jarman on Wills (5 Ed.) star page 410, and cases cited; *Tucker et al. v. The Seaman's Aid Society*, 7 Met. 188; *Bradley v. Bradley*, 24 Mo. 312; *Gregory et al. v. Cowgill et al.*, 19 Mo. 415; 48 Mo. 292; 19 Mo. 416; 14 Cal. 110; 6 Conn. 274. (3) The provision in question is void for uncertainty. In every will creating legacies or trusts there should be such *certainty* as will enable the court to carry them out. Where such uncertainty exists that the court cannot see what object the testator had in view, or for what he intended to provide, then the legacy or trust must fail. Bequests for purposes of benevolence and general liberality, such as the trustee shall approve or direct, cannot be supported either as *general trusts* or for *charitable uses*. *Schmucker's Estate v. Reel*, 61 Mo. 592; 2 Perry on Trusts (3 Ed.) sec. 729; 1 Perry on Trusts (3 Ed.) sec. 253; 9 Vesey, 399; 10 Ves. 521;

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Wheeler v. Smith, 9 How. 79-80; *Gilbert v. Chapman*, 19 Conn. 347; *White v. Fiske*, 21 Conn. 257; 22 Conn. 55; 4 Am. L. Reg. (old series) 526; 2 Story Eq., secs. 979 a, 979 b.; 1156-1183; 1 Jarman on Wills (5 Ed.) star page 383, sub-div. 5; *Wilderman v. Mayor and City Council of Baltimore*, 8 Md. 551; 4 Harr. and Johns. 446. (4) The object and purpose of the testator in employing such vague and indefinite expressions as "to advance the cause of religion and to promote the cause of charity" was to evade the inhibitions of section thirteen of article one of the constitution of 1865. This the petition concedes and the provision in question is, therefore, void. *Schmucker v. Reel*, 61 Mo. 592; *Kenrick v. Cole*, 61 Mo. 572. (5) This provision, then, being pronounced void by the constitution of 1865, and the estate of the heirs not having been divested by it the fact that the constitution of 1875 gave no place to this prohibition, can not have the effect of making valid, what was before void, so as to divest the estate of the heirs in this property. *McCarthy v. Hoffman*, 23 Pa. St. 508-509; *Alter's Appeal*, 67 Pa. St. 344-345; *Greenough v. Greenough*, 11 Pa. St. 489; *Hilliard v. Miller*, 10 Pa. St. 338; *Snyder v. Bull*, 17 Pa. St. 58; *State to use of Trustees M. E. Ch. v. Warren et al.*, 28 Md. 355, top page; Const. Mo., 1835, art. 1, sec. 28; Const. Mo., 1875, art. 2, sec. 15. (6) Nor is this a case where the doctrine of *cypres* applies. It applies only where the object is known and certain, but fails entirely, or ceases to exist, or is impossible of execution for some reason or objection encountered in its execution and outside of the will. Then the court will designate some other cognate charitable use to which the bequest can be applied. *Academy, etc., v. Clemans*, 50 Mo. 171; 2 Perry on Trusts, 727, 729; *Jackson v. Phillips*, 14 Allen 539. (7) Mrs. Corby only took a life estate in the property. *Hazel v. Hagan*, 47 Mo. 281; *Norcum v. D'Oench et al.*, 17 Mo. 99; *Ruby et al. v. Barnett*, 12 Mo. 3; *Green et al. v. Sutton et al.*, 50 Mo. 192; *Bryant, Adm'r, v. Christian, Adm'r*, 58 Mo. 98.

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H. L. Warren and Alex. Davis for appellants.

(1) It was the manifest intention of the testator to impose or create a trust in order "to advance the cause of religion and promote the cause of charity." The devise was impressed with the character of a trust for the purposes named and the fact that the objects intended to be benefited are not designated with certainty and clearness does not destroy its character as such. *Schmucker's Estate v. Reel*, 61 Mo. 592; *Williams v. Williams*, 1 Simon (N. S.) 358; 2 Roper on Legacies, by White, ch. 21, sec. 6, *et seq.*; Lewin on Trusts, ch. 5, p. 77, *et seq.*; 2 Story Eq. Jur. (12 Ed.) sec. 1068 *b*, *et seq.*; *Gordon v. Green*, 10 Ga. 354; *Norman v. Burnett*, 25 Miss. 183; 2 Fonbl. Ch. sec. 4; Hill on Trustees, 101; Wigram on Wills, 33; 2 Redfield on Wills (2 Ed.) 410; Jarman on Wills, 336; 2 Pomeroy Eq. Jur. p. 571, sec. 1009, *et seq.*; 2 Sugden on Powers (top p.) 158, sec. 34; *Erickson v. Willard*, 1 N. H. 217; *Collins v. Carlisle*, 7 B. Monroe, 14; *Bull v. Bull*, 8 Conn. 47; *Bernard v. Minshull*, Johnson (Eng. Ch.) 276. It is apparent that the testator appreciated, practically, the distinction between powers, which are never imperative, and trusts, which are always obligatory. 2 Sug. on Powers (top p.) 158, sec. 34; 2 Story Eq. Jur., sec. 1070, and notes; Hill on Trustees (2 Ed.) 72; 1 Williams on Executors, 88; *Brown v. Higgs*, 8 Vesey, 708; *Burrow v. Philcox*, 5 Myl. and Cra. 73; *Pushman v. Filliter*, 3 Vesey, 7; *Morice v. Bishop of Durham*, 10 Vesey, 536. (2) The trust intended is void and the property descends to the testator's heirs. *Schmucker v. Reel*, 61 Mo. 597; *Morice v. Bishop, etc.*, 9 Ves. 399; *Mayor v. Wood*, 3 Hare 131; *Chamberlain v. Sterns*, 111 Mass. 276; *Ruth v. Oberbrunner*, 40 Wis. 254; *Nicols v. Allen*, 130 Mass. 211; *Olliffe v. Wells*, 130 Mass. 221; *Briggs v. Penny*, 3 DeGex and Sm. 525; 3 Mac. and G. 546. (3) Neither the statute of 43 Elizabeth, nor the doctrine of *cy*

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pres is applicable. *Chambers v. St. Louis*, 29 Mo. 549; *State v. Prewett*, 26 Mo. 165; *Academy v. Clemens*, 50 Mo. 157; *Schmidt v. Hess*, 60 Mo. 595; *First Bap. Church v. Robberson*, 71 Mo. 333.

Thomas Thoroughman for appellants.

(1) The petition admits that the devisee, Amanda Corby, is entitled to a provision out of the estate for her wants and comforts during her natural life; beyond this she holds the property as trustee and the heirs at law are the real owners. "No particular form of words is necessary to create a trust. It will be sufficient if the intention be manifest that the donee shall not have the sole, beneficial interest in the property." *Gordon v. Green*, 10 Ga. 354; *Norman v. Bennet*, 25 Miss. 183. Any language in writing clearly expressive of a trust intended by a party, although in the form of a desire or request or recommendation, creates a trust. 2 Story's Eq. secs. 972, 1068; Hill on Trustees, 101; Wigram on Wills, 33; *Schmucker v. Reel*, 61 Mo. 593; *First Bap. Church v. Robberson*, 71 Mo. 326; *Briggs v. Penny*, 3 DeGex and Sm. 525; *Morice v. Bishop*, 9 Ves. 399. (2) It is plain that the trusts created by the will are invalid. Nothing is better settled than that the special wishes and directions of a testator, whether oral or written, which are not embodied in his will, are inadmissible in evidence and form no part of the will. *Schmucker v. Reel*, *supra*; *Briggs v. Penny*, *supra*; *Morice v. Bishop of Durham*, 9 Ves. 399; *Bridges v. Pleasants*, 4 Seldon Eq. 26; *White v. Fisk*, 22 Conn. 31. (3) The statute of 43 Elizabeth, chapter four, furnishes no assistance and it is of no importance whether it be recognized as in force in this state or not. That statute neither created nor inhibited charities. It only provided for the enforcement of certain *valid* charitable gifts. *Ould v. Washington Hospital*, 5 Otto 303; *Vidal v. Philadelphia*, 2 How. 128; *Fontaine v. Ravenel*, 16 How. 379; *Schmidt v. Hess*, 60 Mo. 595; 2 Story's Eq. Jur., sec. 1187. Nor

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can the doctrine of *cypres* or *parens patrie* be invoked. *Fontaine v. Ravenel*, *supra*; *White v. Fisk*, 22 Conn. 53; *Andrew v. N. Y. Bible Society*, 4 Sandf. 56; *Williams v. Williams*, 17 How. 382. (4) The clause in regard to aid and assistance to relatives creates no valid power and imposes no valid trust. 2 Sugden on Vendors (3 Am. Ed.) sec. 145; Story's Eq. Jur., sec. 1070; *Pushman v. Filliter*, 3 Ves. 7; *Brown v. Higgs*, 8 Ves. 569. Powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative and are obligatory on the conscience of the party intrusted. *Brown v. Higgs*, 5 Ves. 708; *Barrow v. Philcox*, 5 Myln. and Cra. 73; Hill on Trustees (2 Ed.) 72; 1 Williams on Executors, 88. (5) Mrs. Corby has no valid power of conveyance under the last clause of the will.

Jeff. Chandler for appellants.

(1) All of the will, except that which provides for the payment of the testator's debts and for the wants and comforts of Mrs. Corby, is void for uncertainty. The first uncertain provision in the will relates to the relatives of the testator. It contemplates and requires that Mrs. Corby shall give them such portions of the estate as her sense of justice may require her to give and such as the testator had expressed to her a desire that she give his relatives. It is uncertain who of his relatives were in his mind and what shares of his estate they were to receive. Parol evidence cannot be introduced to make the will in that respect more certain. 1 Greenl. Evid., sec. 289. (2) The uncertainty in amount, which is by the will, to go to some relatives of John Corby, renders the amount that will be left, the balance to be devoted to charity and religion uncertain, because that balance cannot be ascertained until the amount to be given to the relatives is first known and deducted. 2 Perry on Trusts, sec. 714; 1 Jarman on Wills. (Ed. 1861) 195, 196.

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(3) Under the laws of Missouri a court of equity cannot act as a board of distribution of property to charitable purposes or purposes claimed to be charitable. Const., art. 4, sec. 43; 2 Perry on Trusts, secs. 707, 708; *Atty. Gen. v. Heelis*, 2 S. and S. 77; *Holland v. Peck*, 2 Ired. 225; *Grimes v. Harmon*, 35 Ind. 198. (4) Mr. Corby does not indicate in any degree whether he used the word charity in its legal sense. "Charity and charitable use" have somewhat a technical meaning in the law. 2 Perry on Trusts, 697. Before the will can operate to take the property away from the heirs at law and suspend the laws of descent and distribution it must affirmatively appear from the *will itself* that the words charity and religion were used in a sense which will constitute a public charity. This is impossible so far as religion is concerned as there is no *public religion* in this country, nor can the courts *judiciously define religion*. (5) Where property is given to charity and religion and such gift is upheld, the power is left with the trustee to select the charity or the religion to which the property shall go. In that case if the trustee expressed a willingness to carry out the trust and actually proceeded to designate the charity and the religious objects of the trust, some courts have held that such designation will be protected by the court. 2 Perry on Trusts, sec. 720; *White v. Fisk*, 22 Conn. 31. In this case the property is not given by the will to charity and religion generally, but to charity and religion as *controlled by the wishes of Mr. Corby, which are unexpressed in the will itself*. So that the *particular charity, which rests only in the unexpressed wishes of Mr. Corby*, is not indicated in any manner whatever. In this case the petition charges that Mrs. Corby refuses to designate the purposes of this trust, but claims the entire property as her own, which allegation is admitted by the demurrer in this case. This will does not provide for a successor to Mrs. Corby, and if her discretion is to be the rule of distribution of this property, her failure to declare the objects of the trust and her

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death extinguishes it. 2 Perry on Trusts, sec. 721; *Fontaine v. Ravenel*, 17 Howard 382.

Silas Woodson, G. G. Vest and B. R. Vineyard for respondents.

(1) If the plaintiffs are right, then Mrs. Corby, "my dear wife," and "my dearly beloved wife," as she is called by her dead husband, will take a pittance of not exceeding five thousand dollars a year from the estate during her life, and at her death the estate remaining will be divided amongst the heirs. (2) The expression in the will, "to have and to hold the same to her own use and benefit during her natural life subject to the following conditions," refers only to that species of property coming within the description mentioned in the second provision of the will above quoted, and in connection with which the language is used. 129 Mass. 76. (3) There can be no reasonable doubt, even if the above construction is not the correct one, that, under the second clause of the first condition of the will, Mrs. Corby takes a life estate with power of disposition among the relations of her husband's worldly effects "in accordance with her sense of justice," and "as she may think fit and proper." *Boyer v. Allen*, 76 Mo. 500; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Pennock's Estate*, 20 Pa. St. 279; *Briggs v. Penny*, 3 M. and G. 554; *Williams v. Williams*, 1 Sim. (N. S.) 367; *Howard v. Canesi*, 109 U. S. 733; *Davis v. Madly*, 134 Mass. 588; *Foose v. Whitmore*, 82 N. Y. 407; *Reid v. Atkison*, 5 Irish Rep. (Eq. Series) 373; *Wells v. Doane*, 3 Gray 201; *Rhett v. Mason*, 18 Grat. 541; *Stead v. Mellor*, L. R. 5th Ch. Div. 225; *Creagh v. Murphy*, 7 Irish Reps. (Eq.) 182; *Cole v. Hawes* (L. R.) 4 Ch. Div. 238; *Wells v. Hawes*, 122 Mass. 97; *The Second, etc., v. Disbrow*, 52 Pa. St. 219; *Spooner v. Lovejoy*, 108 Mass. 529; *Ellis v. Ellis*, 15 Ala. 296. The intention of a testator is to be ascertained from *all* the will, and the latter part of a clause is not to bear the rela-

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tion of a codicil annulling the part preceding, but if possible that construction must be adopted which will harmonize the whole. *Webb v. Woods*, 2 Sim. (N. S.) 267; 2 Pomeroy's Eq. Jur., sec. 1016; *Hess v. Singler*, 114 Mass. 59; *Stead v. Mellor* (L. R.) 5 Ch. Div. 225; *Pruden v. Pruden*, 14 Ohio St. 251. In a will the intent governs the words, but in a deed the words govern the intent. *Edwards v. Bibb*, 43 Ala. 666; 10 Bac. Abrid. 535. (4) The "wishes" of the testator not being declared in writing are not susceptible of proof and cannot control the devisee. 22 Mo. 522; 3 Wash. R. P. 452; *Wells v. Doane*, 3 Gray 201; *Mann v. Mann*, 1 John. Ch. 234; *Bradley v. Bradley*, 24 Mo. 315; *Lee v. Shivers*, 15 Rep. 6. If the devise to Mrs. Corby is made upon conditions, they are conditions subsequent, and if they fail because illegal, or impossible, or void, then the devise becomes absolute. 4 Kent Com. 130; 2 Williams Exec'r, 907; 2 Redf. on Wills, 285. (5) If property be given to one by will subject to a certain charge less than the whole value, the donee will take the remainder beneficially. 3 Redf. on Wills, 511; *Rogers v. Rogers*, 3 P. Williams, 193; *King v. Dennison*, 1 Ves. and B. 272; *Wood v. Cox*, 2 M. and C. 684; *Cook v. Hutchison*, 1 Keene 42. When an estate is devised upon successive trusts, some lawful and some unlawful, the lawful will be upheld. *DeKay v. Irving*, 5 Denio 646; *Manice v. Manice*, 4 Hand. (N. Y.) 363; *Harrison v. Harrison*, 36 N. Y. 547. (6) Under this will no time is limited within which Mrs. Corby may appoint said estate to the relatives of said testator. She has, therefore, her whole life in which to make said appointment. *Finley v. King*, 3 Pet. 376; *Wead v. Gray*, 78 Mo. 65; *Ingraham v. Meade*, 3 Wall. Jr. 32; *Phett v. Mason*, 18 Gratt. 541. If the donee of a power or trustee, is to select from the donor's relations those to whom he is to give the property, in the execution of the power, he may select from the whole circle of relations, whether near or distant, and he may exclude some altogether. 1 Perry on Trusts, sec. 256; *Harper v.*

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Phelps, 21 Conn. 269; *Graeff v. DeTurk*, 44 Pa. St. 532; *Macey v. Shurmer*, 1 Atk. 389; *Ward v. Morgan*, 5 Cold. (Tenn.) 407; *Liefe v. Saltinstone*, 1 Mod. 189; 2 Sugden on Powers, top page 222. (7) The position that Mrs. Corby cannot under the will convey an estate in fee simple, for the reason that she has only a life estate, is not well taken. *Boyer v. Allen*, 76 Mo. 500; *Owen v. Ellis*, 64 Mo. 88; *Campbell v. Johnson*, 65 Mo. 439. (8) The mode in which Mrs. Corby may execute her power of apportionment among the testator's relatives not being specified she may execute it by either deed or will. *Friend v. Oliver*, 27 Ala. 532; *Christy v. Pulliam*, 17 Ill. 59; 2 Hilliard Real Prop. 837. (9) If our construction of the second clause of the first section of the will be correct, it disposes of plaintiffs' action, for until the death of Mrs. Corby it cannot be known whether there is any property upon which the remaining portions of the will can take effect. She has power to give to her husband's relatives, if her "discretion and sense of justice" so dictate, the whole of the estate, and if so, it becomes immaterial what construction be given to the clause in regard to religion and charity. (10) If the will, however, created a trust relating to charity and religion, it is a valid trust and will be enforced. *Hesketh v. Murphy*, 36 N. J. Eq. 309; *Beckwith v. St. Phillip's Church*, 15 Cent. Law. Jour. 455; 2 Story's Eq. Jur., sec. 1165; 2 Perry on Trusts, 709; *Goode v. McPherson*, 51 Mo. 127, affirming the doctrine of *cypres*, decided in 50 Mo. 171; *Pickering v. Shotwell*, 10 Pa. St. 23; *Vidal v. Girard*, 2 How. (U. S.) 196.

JOHN C. GAGE, Special Judge.—The plaintiffs are a part of the heirs at law and legal representatives of John Corby, deceased. The defendant, Amanda Corby, is the widow of said John Corby, and the other defendants are all his other heirs at law. The defendants demurred to the petition of plaintiffs in the court below, and their demurrer was sustained, the court holding that the peti-

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tion stated no cause of action. The petition states that John Corby died May 9, 1870, seized and possessed of a large amount of real and personal property, which is fully described; that the plaintiffs and defendants are his heirs at law and representatives, and that said Amanda is his widow.

The petition then proceeds as follows: "Plaintiffs further state that on, to-wit: the — day of —, 1870, there was duly admitted to probate, and probated, as the last will and testament of said John Corby, deceased, an instrument in writing, which was and is in words and figures, as follows, to-wit: 'In the name of God, amen: I, John Corby, of the city of St. Joseph, county of Buchanan, and the state of Missouri, being of sound mind and clear memory, and being fully aware of the uncertainty of life, and the certainty of death, and being desirous of disposing of all my worldly goods and effects in such a manner as I believe to be just and equitable, do declare the following to be my last will and testament: I do will and bequeath to my dearly beloved wife, Amanda Corby, all my property of every kind that I am possessed of, both real, personal, and mixed, including all my lands, lots, tenements, improvements, hereditaments, wherever situated. Also, I do hereby will and bequeath to my said wife, Amanda Corby, all my moneys, notes, bonds, bank stock, insurance stocks, or any other evidences of debt, and of money or property of every kind or character whatever, which I own or have any claim to, to have and to hold the same to her own use and benefit during her natural life, subject to the following conditions: *First*, that she will pay all of my debts. *Secondly*, that after providing for her own wants and comforts, I leave to the discretion of my dear wife to give to such of my relations such aid or assistance as my dear wife may, of her own will, think proper and just, hereby declaring that my relatives have no claim of any kind upon me, or upon any of my property; and anything that they may receive from my said

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wife, out of my worldly effects, shall be in accordance with her sense of justice, and in accordance with my wishes, the nature of which she has been advised of by me during my life. *Secondly*, that the balance of my said property will be given to advance the cause of religion and promote the cause of charity, in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes. *Thirdly*, for the purpose of enabling my dearly beloved wife to more effectually carry out my wishes in reference to the disposition of my property as aforesaid, she is hereby authorized and empowered to lease, sell, or convey any of my said property which she may think will be beneficial to said property, by leasing or selling the same.' Which said will was duly recorded in said probate court, and now remains on file therein, and letters-testamentary duly issued out of said probate court to the said Amanda Corby, as executrix thereof, who now acts as such executrix.

"Plaintiffs state, that in and by the terms of said will, said deviser devised and bequeathed to said defendant, Amanda Corby, all of his property, real, personal and mixed, including said property hereinbefore mentioned, to hold the same during her natural life, as a trustee, and in trust, for the following purposes, to-wit:

"1. Out of said property to pay all of said testator's just debts, and for the payment of which his said estate and property should be liable.

"2. To provide for her own reasonable and proper wants and comforts during her natural life, out of the income, rents and profits of said estate and property.

"3. Thereafter to pay, assign and convey to certain relatives of said deceased, certain parts and proportions of said property hereinbefore mentioned, in accordance with the wishes and directions of said testator, which were communicated and given to her by

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said testator in his lifetime, and which were not expressed, contained or embodied in said will; and the nature of which directions and wishes are to plaintiffs unknown.

"4. To give, assign and transfer the balance of said property of said testator which might remain after the execution of said foregoing trusts, to advance the cause of religion and promote the cause of charity in some manner which should accord with and carry out certain wishes and directions in that regard, which were made known and communicated to the said devisee in the lifetime of said testator, and which were not embraced, contained or embodied in the said will, and the precise nature of which are to plaintiffs unknown, but plaintiffs are informed and believe, and so state the fact to be, that said wishes and directions, so communicated to her, provided and required that said balance of said estate should be by her given and devoted to and for the support, use and benefit of some religious sect, order or denomination, to plaintiffs unknown, or for the support, use or benefit of some minister, public teacher, or preacher of the gospel, as such, to plaintiffs unknown.

"And said devisee, in and by said will, was authorized and empowered to lease, sell, or convey, any of said property which might be necessary to enable her to execute and perform the said trusts before mentioned, and as might be beneficial to said property and estate, and not otherwise.

"Plaintiffs state that under and by virtue of the terms of said will, the said Amanda Corby has entered upon, and taken possession of all the property of every description of which said John Corby died seized and possessed including said property, real and personal, hereinbefore mentioned; and she gives out in speeches, and claims that, under and by virtue of the terms and provisions of said will, she is the absolute and beneficial owner of all of said property, real and personal, and that plaintiffs have no interest therein, in

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law or equity, and threatens to convey, encumber, and convert to her own use all of said property and the proceeds thereof, and plaintiffs state that she will so do unless restrained by this court.

"And plaintiffs say that said devisee refuses to render an account of the rents, issues and profits of said property and estate to plaintiffs, or either, or any of them. Plaintiffs further state, that they are advised by counsel, believe, and so state: First, that under and by virtue of said will, the devisee took and holds only a life estate in said property, for and during her natural life, and that the plaintiffs and said other heirs at law of said testator, John Corby, are the owners of the fee of said lands in remainder, upon the termination of said life estate, and of all of said personal property remaining after providing for the said reasonable and proper wants and comforts of said Amanda Corby, out of the income, rents and profits of the same, and of said lands, and that said Amanda Corby holds the said property as trustee for them, subject to and after the payment of the just debts of said John Corby, out of said property and estate.

"Plaintiffs are further advised by counsel, and so state, that so much and such parts of said will as required said Amanda Corby to pay, assign and convey to relations of said deceased, parts and proportions of said property in accordance with wishes and directions of said testator, communicated and given to her in his lifetime, and which are not expressed and contained in said will, are void and of no effect.

"Plaintiffs are further advised, that so much and such part of said will as requires Amanda Corby to give and transfer the balance of said property as should remain, after the execution of the said trusts therein mentioned, to advance the cause of religion and promote the cause of charity, as hereinbefore mentioned, are void and of no effect.

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"Plaintiffs further state, that the annual rents, income and profits of said property and estate, before mentioned, are equal to thirty thousand dollars, and said Amanda Corby is in receipt and enjoyment of the same, and claims the right to receive, hold and appropriate the same to her own use. Plaintiffs state that the annual sum of five thousand dollars, for and during her natural life, of the said income, rents, and profits, is a sufficient sum and allowance to provide for the reasonable and proper wants and comforts of said Amanda Corby. And plaintiffs state that all of the just debts of said John Corby, for the payment of which his said estate and property was liable, have long since been fully paid and satisfied.

"Plaintiffs, therefore, pray that said defendant, Amanda Corby, be required to render an account of said property, real and personal, held and claimed by her, under and by virtue of said will, and of the annual rents, income and profits of the same, heretofore received and collected by her, and that an account be taken by and under the direction of this court of the same, and of the amount of said annual rents, income and profits heretofore accruing, and that out of the same there be assigned and allowed to said Amanda Corby, the annual allowance and sum of five thousand dollars, or such other amount as the court may find necessary to provide for the reasonable and proper wants and comforts of said Amanda Corby during her natural life, and that she be decreed to hold the said property and estate of said John Corby, deceased, as trustee thereof, during her natural life, and that she be restrained from assigning, transferring, or converting to her own use, any of said property, real or personal, or the income, rents, or profits thereof, in excess of said annual sum so allowed and assigned to her, and that plaintiffs, and said other heirs at law of said John Corby, deceased, be declared and decreed to be the owners, in their legal proportion as such heirs at law of the said property, subject to the

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said life estate and trust vested in said Amanda Corby, by and under the said will. And for such other and further relief as may be equitable and proper."

It will be seen that the portion of the petition material in this controversy is that which construes or involves, in part, at least, a construction of the will. The demurrer admits all the facts stated, but not the construction claimed. If the effect of this will is to confer upon the plaintiffs the rights and interest in the estate of the testator they claim for themselves, or any of those rights or interests, and to place the widow in the position of a trustee for them, then the demurrer ought not to have been sustained, and the judgment must be reversed; but if the widow is not a trustee for the plaintiffs of any such interest, the judgment was right. To this extent, and no further, it will be necessary to construe the will.

The construction which the heirs themselves place upon the will, is the first subject to be considered. The court is called upon, from their petition, to spell out what is their interpretation of it, upon which they base their right of action, and this is a task of some difficulty, for the petition is liable to the same objection of inconsistency that is urged against the will. The petition charges that by his will the testator devised and bequeathed all his property to the widow to hold "during her natural life, as a trustee, and in trust for the following purposes, to-wit: First. Out of said property to pay all of said testator's just debts, etc. Second. To provide for her own reasonable and proper wants and comforts during her natural life, out of the income, rents and profits of said estate and property. Third. Thereafter to pay, assign and convey to certain relations of the said deceased, certain parts and proportions of said property, etc. Fourth. To give, assign and transfer the balance of said property of said testator, which might remain after the execution of said fore-

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going trusts, to advance the cause of religion and promote the cause of charity," etc.

Again, the petition states: "Plaintiffs further state that they are advised by counsel, believe and so state: First. That under and by virtue of said will, the devisee took and holds only a life estate in said property for and during her natural life," etc. Beyond question, this petition charges that the will vests in the widow only a life estate, and also that under it she holds the remainder in trust. It cannot be that she holds a fee in trust, unless the will gives her a fee. The very term, *trust*, implies an estate in the trustee, at least, commensurate with the trust. A trust is a relation between two persons, by virtue of which one of them (the trustee) holds property for the benefit of the other (the *cestui que trust*). She may have a mere power to dispose of the fee without the fee; such power may be valid if executed to convey the fee, but this would not constitute her a trustee, or render her liable to be proceeded against as such. It is claimed by the plaintiffs, however, in one part of the petition, that she holds the life estate itself in trust, and the object of the suit is to make her account for the income, rents and profits of the estate. We might, perhaps, with propriety, for the purposes of this decision, confine ourselves to the latter question, whether the life estate is, or is not held in trust, but as the defendants dispute this construction, we shall consider first what estate the widow does hold under this will.

The clause of the will, devising and bequeathing her interest in the property to her, is as follows: "I do will and bequeath to my dearly beloved wife, Amanda Corby, all my property of every kind that I am possessed of, both real, personal, and mixed, including all my lands, lots, tenements, improvements, hereditaments, wherever situated. Also, I do hereby will and bequeath to my said wife, Amanda Corby, all my moneys, notes, bonds, bank stock, insurance stocks, and any other evidences of debt, and of money or property of every kind or char-

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acter whatever, which I own or have any claim to, to have and to hold the same to her own use and benefit during her natural life, subject to the following conditions: First. That she will pay all my debts. Secondly. That after providing for her own wants and comforts, I leave to the discretion of my dear wife to give to such of my relations such aid or assistance as my dear wife may, of her own will, think proper and just; hereby declaring that my relatives have no claim of any kind upon me, or upon any of my property, and anything that they may receive from my said wife out of my wordly effects, shall be in accordance with her sense of justice, and in accordance with my wishes, the nature of which she has been advised of by me during my life."

It is contended that the limitation, to hold during her natural life, applies not only to the bequest of moneys, stocks, etc., with which it is immediately connected, but to the devise of real estate as well, which precedes it; that the expression "subject to the following conditions, first, that she will pay all my debts," etc., means *in trust for the following purposes*: First, that she will pay all the testator's debts; second, that she will use any such amount thereof as may be reasonable to provide for her own wants and comforts, and after so providing for herself, will give and convey certain portions of his property to certain of his relations, according to his directions and wishes, which he has communicated to her.

The second clause of the will is as follows: "Secondly. That the balance of my said property will be given to advance the cause of religion, and promote the cause of charity in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes." The construction which is given to this clause by the petition is, that it constitutes an additional use for the trust established by the first clause. By "the balance of my said property" is meant, it is claimed, all the residue of personal property and income

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that may not be expended by the widow in her lifetime in satisfying the preceding trusts and the fee in the real property. It is further stated that the real meaning and intent of this is that this "balance" of property should be given by the widow to and for the use and benefit of some religious sect, order or denomination, or for the support, use or benefit of some minister, public teacher, or preacher of the gospel as such.

The third clause of the will merely authorizes the widow to dispose of the estate by sale or lease, in certain cases, and for certain purposes, and is only material as it may throw light upon or limit the meaning of the preceding clauses. It is said that this will was written by the testator himself. It is evidently the work of an unpracticed hand, and of a mind untrained to habits of precise and consecutive thought, or weakened by age or disease. It contains an abundance of legal terms and phrases, but the ideas expressed are indistinct and confused, and there is hardly a sentence in it that is not inconsistent with some other provision. In construing such a writing as this, absolute reliance cannot be placed upon any particular part of it, but the whole will must be examined with unusual care to determine what was the general intent and meaning of the testator. He first says: "I do will and bequeath to my dearly beloved wife, Amanda Corby, all my property of every kind that I am possessed of, both real, personal and mixed, including all my lands, lots, tenements, improvements, hereditaments, wherever situated." This is an absolute gift of all his property, real and personal. In the next sentence he gives her a portion of the same property for life, upon conditions as follows: "Also, I do hereby will and bequeath to my said wife, Amanda Corby, all my moneys, notes, bonds, bank stock, insurance stocks, or any other evidences of debt, and of money or property of every kind or character whatever, which I own or have any claim to, to have and to hold the same to her own use and benefit during her natural life, subject to the follow-

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ing conditions." If this were the whole will, or there were no other references in it to any further disposition of the property, it would be very doubtful what effect, if any, should be given to the words "to have and to hold the same to her own use and benefit during her natural life," and especially whether they limited in any manner the gift of the real estate.

But there are still other inconsistencies contained in the succeeding paragraphs. The second clause is as follows: Secondly. "That the balance of my said property will be given to advance the cause of religion, and promote the cause of charity in such manner as my dearly beloved wife may think will be most conducive to the carrying out of my wishes." Whether by "the balance of my said property" he meant that which he had not already disposed of, that is, the remainder after the life estate, or what might remain unexpended by his wife after the payment of his debts, her support and maintenance, and the aid and assistance she might render to his relations, the remainder or surplus of the moneys, notes, stocks, bonds, etc., is certainly included in this balance. And this balance he now says will be given in such manner as she may think will be most conducive to the carrying out of his wishes, will be given then necessarily by her. He had evidently forgotten that her interest in this property had already been limited to her life, and that at her death she would have no power to give this part of the estate.

But the third clause is still more inconsistent with everything that precedes it. It is as follows: "Thirdly. For the purpose of enabling my dearly beloved wife to more effectually carry out my wishes in reference to the disposition of my property as aforesaid, she is hereby authorized and empowered to lease, sell or convey any of my said property which she may think will be beneficial to said property by leasing or selling the same." These terms leasing, conveying, selling, manifestly refer to the real estate. If by the first clause any property whatever

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was given to the wife absolutely it was the real estate, and now by this clause he gives her a very limited power of disposition of it. She can sell, convey or lease such of it as she may think it will be a benefit to the estate to lease or sell, and not at all for her own use or benefit. If he had ever intended to give her an estate in fee he had now forgotten it. This is the last clause of the will and it is impossible to believe that when he signed it he thought that he had given his wife an absolute fee simple in his real estate. Turning back to the first clause we find that a very slight change in the punctuation would make the limitation to a life estate apply to the entire gift of lands, chattels and choses in action, and this we think is the most reasonable solution of the question.

Assuming, then, for the present, that the estate of the widow is a life interest in all the property, as claimed by the plaintiffs, and not an absolute estate, as claimed by defendants, is that estate subject to any trust whatever? The only question is whether by and under the will she is made a trustee. The estate was subject to the payment of the testator's debts, as in every estate, but the heir or devisee is not thereby constituted a trustee. The will declares that she is to hold the estate for life, subject to the following conditions: "First. That she will pay all my debts." This is, in the proper sense, a condition, a condition subsequent, and, although a condition may in some cases import a trust, this is not a condition of that kind. The second so-called condition is in no proper sense a condition; neither does it evince or imply a trust. The language is: "That after providing for her own wants and comforts I leave to the discretion of my dear wife to give to such of my relations such aid or assistance as my dear wife may of her own will think proper and just." Here is the widest discretion; she may give nothing; she may give everything, she has entire freedom in selecting the objects of her bounty. If language can do it the testator here disavows any such

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intention or meaning as that imparted to him by the plaintiffs. It is claimed, however, that we have a case of an expression of a desire or confidence by the testator that the devisee should aid and assist his relatives; that his wishes in that respect had been made known to his wife, and that this is sufficient to constitute a precatory trust. This is not so; the testator had no such desire or confidence. "I leave to the discretion of my dear wife to give to such of my relatives such aid or assistance as my dear wife may of her own will think proper and just." It is her discretion, her will, her sense of justice that is to determine what aid or assistance shall be given and to whom; and in exercising this discretion she is assured that she may do it uninfluenced by any claim of right on the part of the relatives, and that whatever she does in the exercise of her discretion must be taken by the relatives as the result of the testator's wishes. If, however, the language were stronger than it is and did it express both a definite wish and confidence on the part of the testator, it would not constitute the wife a trustee, if coupled with this plain and unmistakable intention that the aid or assistance was to depend on her discretion.

There are undoubtedly many cases in the books that have gone far in holding that expressions of desire or confidence in a will create trusts, but the tendency of modern decisions is to have regard to the intention of the testator as gathered from the whole will in determining whether or not such expressions shall create a trust. The latest case upon this subject is *In re Adams and The Kensington Vestry*, Law Rep., Ch. D., vol. 26, 394. The will in this case was as follows: "I give, devise and bequeath all my real and personal estate and effects whatever and wheresoever unto and to the absolute use of my dear wife, *Harriett Smith*, her heirs, executors, administrators and assigns, in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime, or by will after her

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decease." Cotton, L. J., in his opinion said: "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly, confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe, and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on a true construction of the will, a trust imposed upon her."

Lindley, L. J., in his opinion said: "It is very true that he (the testator) goes on to say (in terms which, having regard to the cases, he had better not have said) that he trusted her to do what was right as to the disposal of his property between his children. It is clear that every man trusts his wife to do what is right if he leaves all his property to her; but this testator has been unfortunate enough to say so, and we have to construe his will because it is contended that he says so in such a way as to turn his wife into a trustee for the children. I quite agree that some of the cases have gone very far and have imposed upon words a meaning beyond what they bear if looked at alone, apart from the authorities. I am glad to see that Lord Justice James had the courage to stem the tide, and I find in the last case I know of before the privy council, that they have taken the same view. It is the case of the *Mussoorie Bank v. Raynor*, in which a man gave his widow the whole of his real and personal property, feeling confident that she would act justly to their children, and divide the same whenever occasion required it of her. The words said there are not quite the same as here, but what the privy council said there was this: 'Passing to the merits of the case, their lordships are of opinion that the current of decisions now prevalent for many years in the court of chancery shows that the doctrine of precatory trusts is not to be extended. I am very glad to

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see that the current is changed, and that beneficiaries are not to be made trustees unless intended to be so by the testator.' ”

The case, *Reid v. Atkinson*, 5 Irish Reports, Equity, 373, referred to by both plaintiffs and defendants in their briefs, is very instructive upon several of the questions that arise in this case. In that case there was a gift of a life estate in terms, with an absolute power of disposition superadded. In that respect it differs from this as the power of disposition here is very limited. On this ground the conclusion was reached that the effect of the power of disposition enlarged the life estate to a fee. Here the want of such unlimited power prevents that result. In that case it is held that the presumption in such cases, when even the object of the confidence is ascertained is, that no trust is intended and that this presumption is still stronger when the object is not expressed in the will. The fact that the testator conceals the object of his desire is held almost conclusive that he intended no trust, but to rely on the discretion and fidelity of his devisee. These cases and the case referred to in the opinions of the judges and the entire current of modern authorities, too numerous for citation, have established the rule that trusts are not to be created for the purpose of carrying out the declared wishes or confidences of a testator, unless he himself by his will has manifested a clear intention of creating a trust. No such intention is manifested here, but the very opposite.

One more question remains to be considered before we pass from the consideration of this clause of the will. The wife is authorized to render aid and assistance. “I leave to my dear wife to give such aid or assistance,” etc., is the expression. Is this aid or assistance to be given out of the body of the estate, the fee of the lands and the principal of the money, or out of the life estate and income already given to her? This question is important because if as we have already determined, only a life estate is given to the wife, and she is by this clause

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authorized to give the remaining estate to such of the relations as she pleases, then a power of appointment is conferred upon her, which she may exercise at any time, and the heirs at law have no standing in court to maintain this suit. But it would be too great a stretch of construction to so hold. This clause seems intended by the testator as an explanation to his heirs rather than a testamentary clause. The testator in effect says to them: "I have given you nothing, I leave my wife to give you, if she sees fit; you deserve nothing from me and have no claim upon me; she knows the use I desire to have made of my estate; if she sees any of you in circumstances that to her sense of justice call upon her bounty and she gives you anything it will be just what I would do under like circumstances." This clause is rather in the nature of a caution and a warning to the heirs that they need not complain of the widow of injustice in giving or withholding. It is neither a gift nor a power. It adds nothing to the estate already given, which is only a life estate, but merely states that in giving to his wife that estate he has left her free to give out of it, or not, as she may see fit, to any of his relations.

We can find no ground whatever in the will for establishing a trust against the life estate of the widow. So far our decision is in entire harmony with the purpose and desire of the testator. He made his wife, loved, honored and trusted by him, the only object of his bounty whom he named in his will. To secure her comfort and happiness he placed in her hands the whole of his large estate. He declared that his relations should have no legal, as they had, in his opinion, no moral, claim upon her for any portion of it. It would be strange, indeed, if, in construing and enforcing this will, it should be held that under it these same relations were entitled to compel this widow to act as their stewardess and keeper of this great estate, to be responsible for it, preserve, manage and increase it for the poor recompense of a bare sustenance; to work for them in this important

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capacity for her board and clothes, and to be subject constantly to be called to answer for what they may consider any extravagance in her expenditure and to be placed under the guardianship of a court at their beck or instance in regard to every item of her expenses. This was not the testator's wish as expressed in his will. If any intention whatever can be drawn from it, it is that for her comfort and support she should have, at least, the income of the estate for her own use and benefit. And we may say, further, that, if under the second clause it had been held that this life estate was by implication enlarged to a fee, the principles enunciated in the cases we have cited would apply equally to that clause, and under them we should be compelled to hold that the strong expression of confidence by the testator, which even took the form of a prediction that his wife would devote his fortune to the uses of charity and religion without any attempt to bind her to a trust, would still leave in her an absolute and unfettered estate. In fact it is not necessary to the judgment upon this case to decide ultimately the extent of her rights. It is probably true that the intention of the testator to make an absolute disposition of his property and to deprive his relations of any part of it under the will, will be defeated by a decision that it conveys only an estate for life, but it is not the decision that defeats his intent. If he intended to make a will and dispose of his property that intent will be of no avail; unless he actually accomplished it, the court will not do it for him; all that a court can do is to declare the effect of a will so far as there is a will; it cannot carry out an intent to make a will.

Nor, admitting that the plaintiffs are the remaindermen and the widow tenant for life, does the petition state a cause of action for waste of the estate. For all that appears she may be able to account fully for all the personal property, and as to the real estate no harm can come to the remaindermen from an attempt of the life tenant to sell his estate. In no possible view of the case

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does the petition state a cause of action. Wherefore the judgment of the circuit court is affirmed. Sherwood, J. not sitting.

HENRY, C. J., Concurring.—I concur in the result, but differ from my associates as to the construction of the will. I think that Mrs. Corby has a life estate with a power of disposition limited only by her discretion and the purposes for which such disposition may be made.

NORTON AND RAY, JJ., Concurring.—Understanding the opinion in this case to hold that under the will of John Corby, Mrs. Amanda Corby only takes a life estate in the real and personal estate, with no power of disposition of the *corpus* or body of the estate, and that as to the remainder in fee said Corby died intestate and that as to the remainder, his heirs and legal representatives take under the law of descents and distributions, we concur in the conclusion reached and in affirming the judgment.

PRIEST, *Appellant*, v. CHOUTEAU.

1. **Partnership.** Whether persons are partners as to each other may be determined by their intention, as the latter is expressed in the words of their contract, or may be gathered from the acts and circumstances attending such contract.
2. **The rule applied and the relation of partnership held to exist between contracting parties.**
3. **Partnership Debts: REAL ESTATE OF FIRM.** Real estate owned as partnership property is bound for all the debts of the firm, and for all advances made by any of the partners, as if it were personal property.
4. ———: ———. The accounts between the partners must be settled and all partnership debts must be paid before any creditor of an individual member of the firm can subject the firm property to the payment of this debt. And his rule applies where one partner

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mortgages his interest in the real estate of the firm to secure his individual debt. The interest thus mortgaged will remain subject to the prior lien for partnership debts.

5. ———: ———: INNOCENT PURCHASER. A purchaser or mortgagee from an individual partner of real estate belonging to the firm will be protected, if he received the conveyance without notice of the equitable rights of the firm in the premises.
6. The finding of the trial court that the mortgagee in this case was affected with such notice affirmed.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

A. J. P. Garesche for appellant.

(1) There was no partnership between DeBar, Chouteau and Mrs. Wakefield. In this state a mere division of profits does not constitute a partnership. *McCauley v. Cleveland*, 21 Mo. 439; *Gwinn v. Rooker*, 24 Mo. 292; *Johnson v. Hoffman*, 53 Mo. 505; *Campbell v. Dent*, 54 Mo. 325; *Donnell v. Harshe*, 67 Mo. 173; *Musser v. Brink*, 68 Mo. 249. (2) Even if the partnership existed the leasehold was not partnership property. Except in the inventory by Mr. Chouteau it was always treated as property in common, not as partnership property. That property even bought for a partnership, and used for it, may nevertheless be held only as property in common, See *McDermott v. Lawrence*, 7 S. & R. 442; *Coles v. Coles*, 15 John. 160; *Forde v. Herron*, 4 Munf. 322; *Frink v. Branch*, 16 Conn. 270; *Polk v. Buchanan*, 5 Sneed, 721; *Webb v. Leggett*, 6 Mo. App. 347. And where, as in this case, the conveyances are to individual members, the property cannot by parol be converted into partnership property. *Hale v. Herne*, 2 Watts, 143; *Lancaster Bk. v. Higley*, 13 Pa. St. 550; *Otis v. Sill*, 8 Barb. 122; *Bird v. Morrison*, 12 Wis. 155. (3) Chouteau was not a competent witness. *Stanton v. Ryan*, 41 Mo. 510; *Johnson v. Quarles*, 46 Mo. 429; *Kellogg v. Malin*, 62 Mo. 432; *Angell v. Hester*, 64 Mo. 144. *Welland v. Weiland*, 64

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Mo. 169; *Sitton v. Shipp*, 65 Mo. 305; *Ring v. Jameson*, 66 Mo. 427. (4) But if the leasehold was partnership property, the plaintiff was an innocent purchaser. *Kerr on Fraud and Mistake*, 253-4. (5) DeBar having shared in the proceeds of the money raised by the deed of trust, his associates are estopped to contest the deed. *Lutzwiler v. Lachman*, 23 Mo. 168.

Hermann & Reyburn for respondent.

(1) The arrangements existing between DeBar, Chouteau and Mrs. Wakefield, constituted a partnership. *Parsons on Part.* (3 Ed.) 44, 50, 62; *Long v. Smith*, 48 Mo. 277; *Myers v. Field*, 37 Mo. 440; *Maclay v. Freeman*, 48 Mo. 234; *Bond v. Pittard*, 3 M. & W. 357; *Clagett v. Kilbourne*, 1 Black, 346. (2) The leasehold was partnership property. *Clagett v. Kilbourne*, 1 Black, 346; *Dupont v. McLaren*, 61 Mo. 508; *Acley v. Stahlin*, 56 Mo. 560; *Carlisle v. Mulhern*, 19 Mo. 56; *Divine v. Mitchum*, 4 B. Monroe, 488; *Hewitt v. Sturdevant*, 4 B. Monroe, 453; *Winslow v. Chiffelle*, 1 Harper's Eq. 25; *Duryea v. Burt*, 28 Cal. 569; *Matlock v. James*, 13 N. J. 126; *Dyer v. Clark*, 5 Met. 562; *Burnside v. Merrick*, 4 Met. 537. (3) The defendant was a competent witness.

EWING, C.—Plaintiff commenced an action of ejectment in the circuit court of St. Louis against the defendant to recover possession of the undivided half of a leasehold estate in the property known as "Debar's Grand Opera House." The answer sets up that on the fifteenth of June, 1877, and prior thereto defendant, Ben DeBar, and Alice Wakefield, through her trustee, Taylor, were partners under the style of "DeBar's Grand Opera House," engaged in the business of running and managing a theatre on the premises, which was partnership property and used as such. That they were interested in said property and business as follows: DeBar one-half, defendant one-sixth, and Alice Wakefield one-third. That on the

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fifteenth of June, 1877, DeBar gave a deed of trust on his undivided half to secure a debt due by DeBar individually to John G. Priest; and plaintiff claims under a deed from the trustee, by virtue of a sale under this deed of trust. That on August 26, 1877, DeBar died, and defendant, by request of Priest and Mrs. Wakefield, and under an order of the probate court, was appointed as administrator of the partnership effects as surviving partner; that, as such, by order of court, he sold the interest of DeBar in the opera house; that one Jno. W. Norton became the purchaser, and to whom the possession was delivered. That the entire partnership property was insufficient to pay the debts of the firm. That Jno. G. Priest, on the fifteenth of June, 1877, and plaintiff, Frederick R. Priest, had notice of the fact that said leasehold was partnership property belonging to and used by said firm in the prosecution of their business.

Both parties claim through Ben DeBar. The property was a leasehold, the term expiring on the first day of January, 1882, and was the property known as the "Grand Opera House," in the city of St. Louis. On the thirteenth of May, 1873, DeBar acquired this leasehold from Truman Martin and wife, and on the twenty-third day of May, 1873, a contract was entered into between DeBar and the trustee of Alice L. Wakefield, she being a married woman, by which said Alice was to acquire a one-third interest in said theatre property and its profits. The agreement is in the following words: "This memoranda of agreement made and entered into this twenty-third day of May, A. D. 1873, by and between Benedict DeBar and Daniel G. Taylor, trustee for Mrs. Alice Wakefield, witnesseth: That in consideration of three thousand, three hundred and thirty-three dollars and thirty-three cents in cash paid, and the payment of the additional sum of ten thousand dollars, for which a promissory note has this day been given, it is agreed by Ben DeBar that said Daniel G. Taylor, as such trustee, shall have one-third of all the profits derived from the

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Grand Opera House property on Market street, the same to be managed and controlled by said Ben DeBar as exclusively as though owned by him during the continuance of the leasehold estate purchased by said Ben DeBar from Truman Martin and wife; all profits to be accounted for by said Ben DeBar on the first day of each month; and the one-third of the profits of the previous month, *less twenty-five per cent. to be reserved to meet any losses that may occur, to be paid to said Taylor, as such trustee; such twenty-five per cent. so reserved to be carried to the account of the next month following*; and when the said note of ten thousand dollars is paid according to the tenor thereof, then a one-third of the building and property mentioned and referred to shall be by deed conveyed to said Daniel G. Taylor, as such trustee; but the management of said premises shall continue in like manner as herein set forth, and in the event that said note for ten thousand dollars is not paid when due, the title to said property to fully remain in said DeBar, released from all claim and interest of said Taylor, as such trustee, and until the payment of said note the profits to be retained by said DeBar to be applied upon said note; and in the event of a failure to pay said note when due, one-half of the \$3,333.33½ this day paid shall be repaid to said Taylor as such trustee, and the balance shall be, with all interest of said Taylor as such trustee hereunder, forfeited to said Ben DeBar and forever terminated.

“BEN. DEBAR, [L. s.]

“DAN’L G. TAYLOR, [L. s.]

“Trustee of Alice L. Wakefield, [L. s.]”

The deferred payments mentioned in the agreement were paid out of the profits of the theater, and a deed was executed to the trustee of the said Alice on or about the twenty-sixth of April, 1875, conveying said one-third interest. Another deed covering the same purchase was made between these parties, dated December 13, 1873. Both deeds convey this same interest, *subject to the provisions of said agreement*; and in both deeds John G.

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Priest executes the conveyance as attorney in fact of *Harriet*, the wife of Ben DeBar. Both deeds were duly recorded; the former on the thirtieth of April, 1875, the latter on December 15, 1873.

By deed dated December 15, 1873, DeBar and wife conveyed to Charles P. Chouteau, defendant in this action, an undivided one-sixth interest in the same property; the deed contains the following provision: "This conveyance, however, being subject to the terms and conditions of a certain contract made between the parties hereto on the twenty-third day of May, 1873, which contract is in its terms and provisions similar to a certain other contract of same date between Benedict DeBar and Daniel G. Taylor, trustee of Alice Wakefield." This deed, too, is executed by John G. Priest, as attorney in fact, of Harriet DeBar, on the nineteenth day of September, 1873, and is duly recorded. "That Ben DeBar, D. G. Taylor, as trustee of Mrs. Alice B. Wakefield, and Charles P. Chouteau, in the month of May, A. D. 1873, each acquired an undivided interest in the leasehold premises in controversy herein, said interests being respectively one-half, one-third, and one-sixth, and that said leasehold consisted of a theatre building and all the furniture, scenery and properties therein contained. That said building, furniture, etc., was acquired, as aforesaid, for the express purpose of being operated as a theatre, by the parties above named, for their mutual benefit and profit, under the management of Ben DeBar; and the same was so operated from May, 1873, until August, 1877, when said DeBar died. That said business, during the period last specified, by agreement of said parties, was conducted by said parties in the following manner: Books of account were kept by Ben DeBar in the name of 'DeBar's Grand Opera House,' wherein were entered all the receipts and expenses of the business conducted therein, including the ground-rent of said leasehold; and at the end of each theatrical season the net profits were divided among the three

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partners above named in the proportions of one-half, one-third, and one-sixth; but that at the end of each year twenty-five per cent. of the net profits accruing to each party, as aforesaid, were set apart and carried forward to the account for the succeeding year for the purpose of meeting any loss that might be sustained during such season. Transcripts of such accounts were furnished each year by said DeBar to Taylor, trustee, and Chouteau, and said books of account were frequently examined in behalf of Mrs. Wakefield, and occasionally by Chouteau. A bank account in the name of 'DeBar's Grand Opera House,' was also kept, separate and apart from the individual account of Ben DeBar, and the moneys realized from said business were deposited to the credit of such account, and the expenses paid therefrom. So far as Mrs. Alice L. Wakefield was concerned there was no agreement exempting her from losses incurred in the business, but as between DeBar and Chouteau there was an oral agreement exempting the latter from losses beyond the amount of twenty-five per cent. of the net profits set apart as a reserve fund at the close of each year's business." That by consent of the parties above named debts were also contracted in the name of DeBar's Opera House, during the continuance and in the prosecution of said business. That after the death of Ben DeBar, by mutual consent of Alice L. Wakefield, Charles P. Chouteau, and the personal representative of Ben DeBar, the defendant in this action qualified as administrator of the firm, or association of persons transacting business, as aforesaid, and as such surviving partner, took possession of the entire leasehold, premises and property aforesaid, as forming part of the partnership assets, and sold the same in that character under an order of the probate court, prior to the institution of this suit, at which sale John W. Norton became the purchaser. There were no instructions asked or given.

The circuit court found for the defendant, holding, as a matter of law, under the facts, that DeBar, Mrs.

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Wakefield, and Chouteau were partners in the theatrical business, and the leasehold was partnership property. That at the time plaintiff purchased at the trustee's sale in 1879 he knew defendant held possession of the leasehold as surviving partner; and that it had been inventoried as partnership property. From this judgment the plaintiff appealed to the court of appeals at St. Louis. That court affirmed the judgment of the circuit court, and plaintiff comes here by appeal.

I. The first and vital question in the case is as to the partnership. Under the facts, were DeBar, Mrs. Wakefield, through her trustee, and Chouteau partners? No general rule can be laid down which will determine the question of partnership in every case. Each case must, in great measure, be governed by the facts and circumstances surrounding it. *Donnell v. Harshe*, 67 Mo. 170. It is held in this state that a mere division of profits does not necessarily constitute the parties partners. *McCauley v. Cleveland*, 21 Mo. 439; *Campbell v. Dent*, 54 Mo. 325; *Donnell v. Harshe*, 67 Mo. 170. In *Parsons on Partnership* it is said: "And although it is undoubtedly true that in much the greater number of partnerships there is a community of loss as well as of profits, the weight of authority, as well as of reason, seems to be decidedly in favor of the rule that there may be a legal and valid partnership, although one or more of the partners are guaranteed by the others against loss. It would seem there must be a community of interest for business purposes." *Pars. on Part.* 41. In *Maclay v. Williams*, 48 Mo. 234, it was said: "An agreement that something shall be done or attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the essential characteristic of every partnership, and is the leading feature in every definition of the term." In *Pleasants v. Fant*, 22 Wall. 120, it is held that one of the approved *criteria* of the existence of a partnership is the right to compel an account of the profits in equity. In *Parsons on Partnership*, page fifty-eight, it is said:

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"It should be added, that whether two or more persons are partners *as to each other*, must generally, and perhaps always, be determined by the intention of the parties, as the same is expressed in the words of their contract, or may be gathered *from the facts, and from all the circumstances* which are available for the interpretation or construction of the contract."

In the case at bar it very clearly appears that the parties, Chouteau and Mrs. Wakefield, purchased their respective interests in the leasehold for the sole purpose and intention of carrying on the business of a theatre. The deeds they received, and the agreements entered into unquestionably indicate this. After the business was entered into it was carried on in the name of "DeBar's Grand Opera House;" a special account in bank was opened in that name, and debts contracted in that name. The deed and agreement entered into between DeBar and Mrs. Wakefield leave no doubt of the intention of those parties and show their community of interest; and the deed to Chouteau clearly comprehends just such conditions as had been imposed on Mrs. Wakefield, and leaves, to my mind, the situation equally clear as to DeBar and Chouteau. The acts of the parties in writing, and otherwise, the transaction of all the business, and the circumstances surrounding the whole case, lead to the inevitable conclusion that they were partners, made so by operation of law, upon their own acts.

II. The next question is, was the leasehold partnership property? It is now considered as settled law that when real estate is partnership property, it is bound for all the debts of the concern, and for all advances made by any of the partners, as though it were personal property. The accounts must be settled between the partners, and all partnership debts must be paid, before any creditor of an individual member of the firm, or his heir or representative can take. In *Duryea v. Burt*, 28 Cal. 569, it is said: "If two or more persons acquire a mining claim for the purpose of working the same, * * *

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and actually engage in the enterprise, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, though there is no express agreement between them to become partners, or to share the profits and losses. The mining ground belonging to and worked by a mining partnership and acquired for mining purposes, *whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property.* Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern, and for money advanced by him for its use, which he may enforce in equity, *even if there has been no agreement among the partners that such lien exists.*" The same rule is approved in *Divine v. Mitchum*, 4 B. Mon. 488; *Winslow v. Chiffelle*, Harper's Eq. 25; *Carlisle's Adm'r v. Mulhern*, 19 Mo. 57. And this rule is not varied, even though one partner shall mortgage his interest to secure an individual debt. The interest thus mortgaged would remain subject to the prior lien for partnership debts.

In *Rossum v. Sinker*, Supreme Court of Indiana, reported in 12 Central Law Journal, 202, it is said: "The rule unquestionably is, that the heirs of a deceased partner have no interest in the real estate owned by the firm until all the partnership debts have been paid. Until all debts have been paid, the surviving partner has the real, substantive interest. * * * Certain it is, however, that the land of a partnership is, in many very essential respects, radically and materially different from land owned by an individual. It is also certain that the surviving partner has the substantive interest in such property, and, unquestionably, the right to own, hold and sell it for the purpose of settling up firm affairs and paying firm debts." See authorities cited in that case. See, also, *Burnside v. Merrick*, 4 Metc. 537; *Dyer v.*

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Clark, 5 Metc. 562. In *Jones v. Parsons*, 25 Cal. 104, it is said: "The same result would accrue in case of the sale under execution of the legal interest of a partner, in the partnership real estate, as in the personal property. The partners are regarded at law as tenants in common, but in equity the property is treated as vesting in them in their partnership capacity, the beneficial interest being held by them in trust until the partnership account is settled and the partnership debts are paid." From what has been said we are led to the conclusion that this leasehold was partnership assets properly in the hands of the surviving partner, and subject first to the debts of the concern.

III. It seems to be the recognized doctrine that an innocent purchaser or mortgagee, from an individual partner, of real estate belonging to the partnership, would be protected unless he had notice of the equitable rights of the firm in the premises. In *Mallock v. James*, 13 N. J. Eq. 126, it is said: "One partner cannot convey to a creditor of his own, so as to give him a preference over the creditors of the firm, his undivided interest in the real estate belonging to the firm, *although the title to such property stands in the individual names of the partners, such grantee having notice of the equitable rights of the firm in the premises.*" The question of notice was the turning point, also, in *Forde v. Herron*, 4 Munf. 316, and the doctrine recognized in *McDermot v. Laurence*, 7 S. & R. 438. In *Frink v. Branch*, 16 Conn. 260, it was held that if the property mortgaged was partnership property and the mortgagee had actual or constructive notice of that fact, the solvent partners would have a lien upon it for the payment of debts due by the partnership.

The fact of notice would seem to be conclusive. The circuit court, to which the questions of fact were submitted, so found, with all the evidence before it, and that finding would not be overturned, unless the evidence would most clearly lead to a different conclusion. But

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we have examined the evidence and must say the finding of the circuit court is the conclusion to which the evidence most strongly leads. The *cestui que trust*, Jno. G. Priest, as attorney in fact, for Mrs. DeBar, signed the deed from DeBar and wife to Mrs. Wakefield, in which is embodied the agreement in writing, which is the foundation of the partnership. The evidence also strongly tends to prove that he was the confidential friend of DeBar for years, and had knowledge of the condition of his business. The plaintiff, Frederick R. Priest, when he became the purchaser under the deed of trust, must have known that the defendant was in possession of the opera house as the surviving partner, and had been as such carrying on the business. The leasehold had been inventoried as partnership property. His suit was commenced on the day of the sale to the purchaser, Norton, by the surviving partner, Chouteau; and from all the facts and circumstances the conclusion is irresistible that the plaintiff had notice of the claim that the opera house was partnership property, and cannot, therefore, be protected as an innocent purchaser without notice.

IV. It is insisted by the appellant that the circuit court erred in admitting the testimony of Chouteau, as in violation of that section of the statute which provides that when one of the original parties to the contract is dead, etc., the other party shall not be permitted to testify. This question has been repeatedly passed upon by this court, but we consider it immaterial in the decision of the case at bar. There may be some question as to the competency of some of the statements of the witness, Chouteau; on this, however, we do not pass. But much of his testimony was clearly admissible. In the absence of other proof, the fact that the deed from DeBar and wife was on record and was offered in evidence and read without objection, would show *prima facie* that it had been executed and delivered. The reference in this deed, to-wit: "This conveyance, however, being subject to the terms and conditions of a certain contract made between

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the parties hereto on the twenty-third day of May, 1873, which contract is in its terms and provisions similar to a certain other contract of *same date* between Benedict DeBar and Daniel G. Taylor, trustee of A. L. Wakefield," must fix the terms of the contract between DeBar and Chouteau. It will be observed that these contracts referred to were made on the same date; and the reference thereto in the deed would be as effectual to determine the rights of parties and the purposes of the conveyances as though it had been incorporated into the deed in full. The reference pointed out the way by which the true intent and meaning could be ascertained, and would be binding upon all parties having either actual or constructive notice of the deed. Under this view of the case Chouteau's evidence in relation to this deed and the contract referred to is wholly immaterial, and even if it was error to admit it, that could not change the result of the finding upon that point, and is not cause for a reversal of the case.

V. We do not consider that there is anything in the question of estoppel. The tendency of the evidence is, we think, very clear that the deed of trust by DeBar on his undivided half of the leasehold was made of his own motion, to secure his individual indebtedness, and not in pursuance of the authority given him to pledge the credit of "DeBar's Grand Opera House" for the purpose of carrying on the business. The evidence tends to show that "DeBar was to use the income of the concern and pledge its credit to carry it on;" again, because DeBar was embarrassed, "he was to pledge the credit of DeBar's Opera House. That he could go on and contract bills in the name of the opera house. Previously, under his written agreement, he could not have done so." Now it is very evident that it was not under this license—under this permission to pledge the credit of the opera house—that DeBar executed the deed of trust to secure Jno. G. Priest. That was evidently an individual transaction. On the other hand, it was doubtless under the authority

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to pledge the credit of the opera house, that he contracted the various debts which the evidence shows this partnership bound for.

The judgment of the court of appeals is affirmed. All concur, except Henry, C. J., absent.

THE STATE TO THE USE OF STANLEY V. THE ST. LOUIS
BROKERAGE COMPANY *et al.*, *Appellants*.

1. **Practice in the Supreme Court : WEIGHT OF EVIDENCE.** Where, in an action at law, the evidence will justify a finding either way, the Supreme Court will not pass upon its weight.
2. **Practice : INSTRUCTIONS.** It is not error to refuse instructions asked where the principles embodied in them are embraced in others given.
3. ——— : ———. An instruction asked is properly refused when there is no evidence upon which to base it.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Fisher & Rowell for appellants.

Crews & Brooth for respondent.

SHERWOOD, J.—This is an action on an indemnifying bond, given by defendants to the sheriff to protect him, he having levied an execution on certain personal property claimed by plaintiff as hers.

The point in contest in the lower court was whether the sale of the property claimed by plaintiff was fraudulent as against the existing creditors of Cronin, who owned the goods prior to their sale by the latter to plaintiff. The cause was tried before Judge Amos M. Thayer, a jury

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having been empaneled. The evidence, would, perhaps have justified a finding either way, but with the weight of evidence we have no concern. "The real issue of fact before the jury (as stated by counsel for defendants) was whether or not said Stanley was aware of the purpose of Cronin in making the sale. The instructions given on behalf of the plaintiff, by the court of its own motion, and on behalf of the defendants, presented the matter at issue to the jury with most unexceptionable fairness, and their verdict must be regarded as final.

The principles embodied in the instructions given, covered, substantially, the ground occupied by the instructions refused, with the exception of one instruction asked by defendants, which is as follows:

"The court instructs the jury that although they may find from the evidence that K. C. Stanley was acting in good faith in the original agreement to make the purchase from P. H. Cronin, and paid a portion of the purchase money, if the jury further find she afterward agreed with said Cronin that the balance of the purchase money should not be paid, and that she should hold said property as if she had paid in full for the same, and that the object or intent of said parties in said last-named agreement was to hinder, delay, or defeat the collection of any of the debts or obligations of said Cronin, then the entire transaction was fraudulent and void as against the creditors of said Cronin and the jury will so find."

It is enough to say regarding this instruction, that without stopping to pass upon its abstract correctness or incorrectness, we think, as did the court of appeals, that there was no evidence upon which to rest such an instruction.

Therefore, judgment affirmed. All concur.